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**HARVARD LAW SCHOOL
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A COMMENTARY
ON THE
SALE OF GOODS ACT, 1893.

A Commentary
ON THE
SALE OF GOODS ACT, 1893,^{cf}

WITH
ILLUSTRATIVE CASES
AND
FREQUENT CITATIONS FROM THE TEXT OF
MR. BENJAMIN'S TREATISE.

BY
Charles Alan
WALTER C. A. KER,
Author of "A Digest of the Law relating to the Sale of Goods,"
AND
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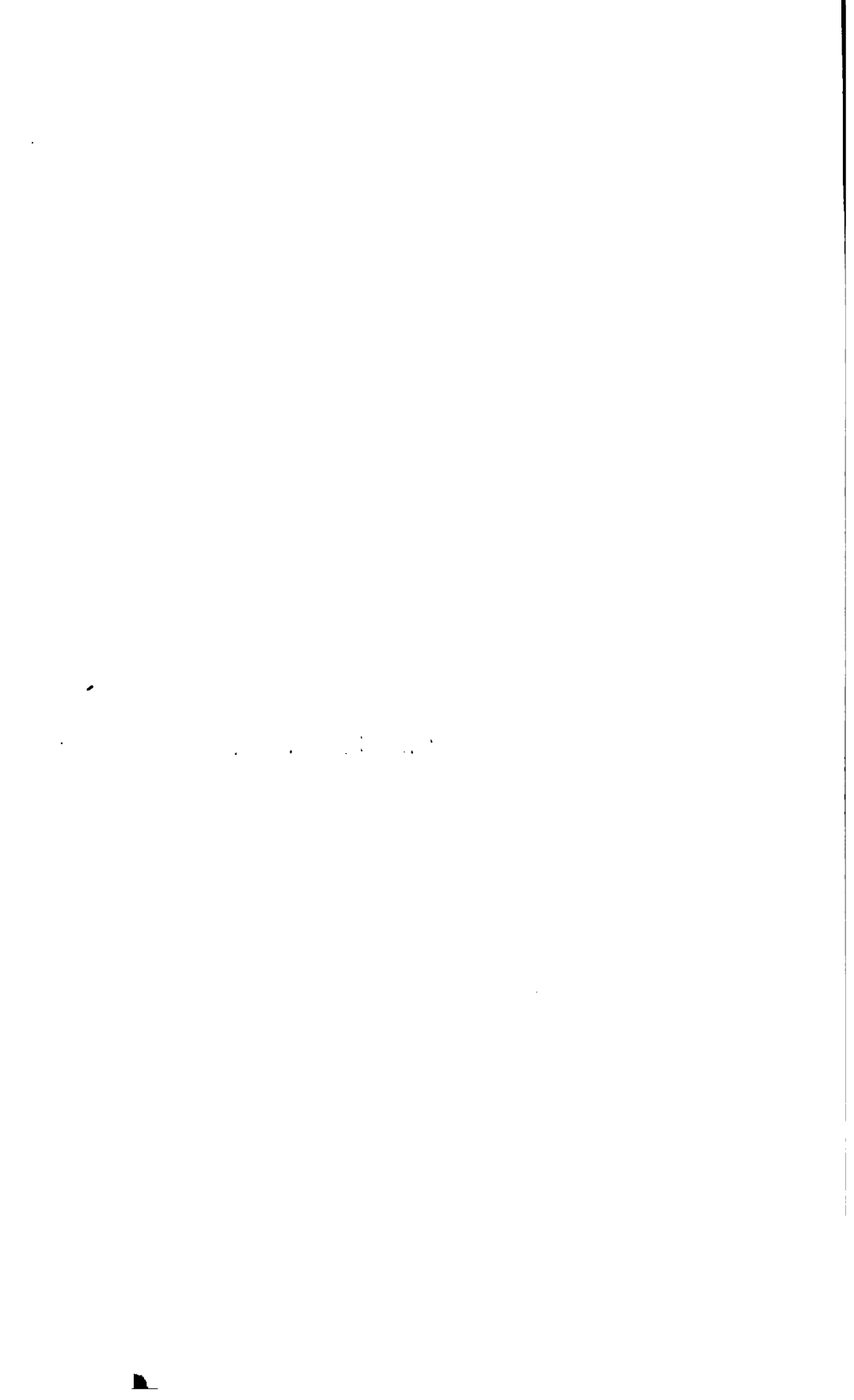
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To the Memory

OF

JUDAH PHILIP BENJAMIN, Q.C.



PREFACE.

A FEW WORDS as to the point of view from which this Commentary has been written may not be out of place.

Lord Herschell, in his judgment in *The Bank of England v. Vagliano* ([1891,] A. C., pp. 144, 145), thus expounds the true principles of interpretation of a codifying Act. The observations had actual reference to the Bills of Exchange Act, 1882, but are equally applicable to the Sale of Goods Act. The noble Lord says:—

“I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples

merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

And further on Lord Herschell says:—

"The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment."

We have in the following Commentary endeavoured to keep these principles in view. It must not, however, be forgotten that, as the Act is not intended to be exhaustive, there are rules of the common law which are not dealt with at all, but are preserved by s. 61(2). With regard to these Lord Herschell's remarks above quoted do not apply.

To those, however, who may be of opinion that, in the light of the above judgment, too much space has been devoted in our Commentary on the express provisions of the Act to a declaration of the previous law, we would briefly explain the *raison d'être* of the book.

Before doing so, however, we may point out that s. 4 (which substantially re-enacts s. 17 of the Statute of Frauds) would seem not to be included in the scope of the principles of interpretation enunciated by Lord Herschell. As every lawyer knows, the section, short as it is, contains a mass of law large enough to occupy no less than 180 pages of "Benjamin on Sale," and, whether or not every line of it be (as has been said) "worth a subsidy," or have rather

"cost a subsidy," it has, at any rate, been the subject of innumerable decided cases ranging over (even in more modern times) a long course of years. The Legislature, having thought fit to re-enact the section in substantially its original form, has at the same time apparently intended that it should be interpreted in the same way and by the same means as its predecessor, that is to say, by the long series of decisions which explain almost every term or phrase employed. We therefore think that no apology is needed, so far as s. 4 is concerned, for the review which we have made of the anterior authorities.

This work is intended as a Commentary on the Act, as explained both by special illustrative cases, and also by frequent reference to the standard text-book on the subject—the late Mr. Benjamin's learned work. It is on these two points that we base any justification which may be necessary for our more or less detailed exposition of the common law of sale.

The utility of illustrative cases we venture to think obvious. The Legislature itself in this country has not yet seen fit to make use of them as a means of interpretation of statutes; but the seal of law has been placed upon them in many of the Indian Acts, notably, the Indian Contract Act of 1872, and to their aid is owed much of the value, as statements of law, which has attached to such authorities as Stephen on Evidence and Pollock on Partnership.

A code, as applicable to the many varying circumstances of human affairs, must from the nature of the case be drawn in broad and general terms. But the very generality of its provisions renders the interpretation more difficult, and it is here that the value of illustrative cases, as embodying special facts, is most clearly seen. To take an instance from the present Act, the words in s. 27, "in accordance with the terms

of the contract of sale," contain in themselves the whole duty of seller and buyer in delivery, acceptance, and payment, as contained in the contract under the circumstances of each particular case.

Assuming, however, the value of illustrative cases, we nevertheless feel a doubt whether we may not have occasionally set out too few, and occasionally perhaps too many. In the event of our being fortunate enough to have a second edition of this book called for, it may be necessary to amend the work in this particular. In the meantime we leave it to the impartial judgment (as merciful, we trust, as may be) of the critic and the practising lawyer.

With regard to the second special feature of the book—the statements of the common law therein quoted from Mr. Benjamin's treatise—we submit that those lucid and accurate statements of legal principles will be found not to be out of place, even in a Commentary on an Act which is intended as a new stepping-stone in the development of the law. It is unnecessary to point out that "Benjamin on Sale" is or was a standard authority on its subject-matter, and also (for Lord Blackburn's earlier book was of only limited scope) the most complete. Its arrangement has been followed by the draftsman, and the Act has undoubtedly been generally based upon it. The extracts we have quoted from the book may therefore, we submit, throw valuable light on the interpretation of the Act; in so far as they are consistent with the provisions of the latter, by containing in themselves a less concise, and therefore more lucid, statement of the principles involved; and, in so far as they may be inconsistent, by affording, it is hoped, a better key to the elucidation of the meaning of the various sections of the Act.

In conclusion, we may say that the labour necessarily incurred (and it has been great) in the compilation of the

following pages, has shown us that the Act is in parts by no means easy to interpret, and is occasionally very obscure. It is but justice to the learned draftsman to say that the difficulties for the most part, if not in all cases, spring from additions and emendations introduced into the Bill in its passage through Parliament. However that may be, it seems certain that it will require, before the meaning of its provisions is finally settled, some judicial interpretation. Moreover, the scope of s. 25, and its meaning when compared with ss. 47 and 48 (2), is at present uncertain, and little judicial authority exists to explain it.

We have added (*post*, p. xliii) a statement of the changes in the law which appear to have been effected by the Act. There are few direct alterations, but it is probable that judicial decisions on the wording of the Act will show that on a number of points the law is no longer what it was.

We have attempted to make the Index as exhaustive as possible; and, though thereby it has extended to a length perhaps somewhat out of proportion to the bulk of the text, yet this result seemed preferable to any curtailment of this most necessary adjunct to a legal commentary.

We desire to express our obligation to Mr. H. F. BOYD, Barrister-at-Law, of the North-Eastern circuit, joint owner of the copyright in "Benjamin on Sale," for permission to make the citations from the text of that treatise.

W. C. A. K.

A. B. P.-G.

THE TEMPLE,

Oct. 1894.

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(56 & 57 Vict. c. 71.)

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ADDENDA ET CORRIGENDA.

Page 11.—*Delete* the comma after "*a fortiori*," in line 8 from foot.

„ 52, 300.—The rule as to the authority of an auctioneer's clerk to sign for the buyer confirmed in *Sims v. Laudray* (1894), 63 L. J. Ch. 535. So also the authority of the auctioneer (at p. 536).

„ 67, note (k).—"*Gathorne v. Adams*" should be "*Gattorne v. Adams*."

„ 95, 96.—The entire paragraph, commencing with *In a sale*, should be in inverted commas.

„ 132, line 23.—"*Appropriated by the other*" should be "*to the other*."

„ 159.—The view here stated, that *Moyes v. Newington* is good law, confirmed at the County of London Sessions in *R. v. Kœnig* (L. T. Jour., Aug. 25th, p. 373).

Held also, apparently, that the Court *had no jurisdiction* to grant a restitution order against an innocent purchaser for value.

„ 170 (Ill. 2).—The words "by word of mouth" should apply to A.'s sale to B., and not B.'s to D.

„ 210, 211.—The entire paragraph, commencing with *The payment*, should be in inverted commas.

„ 217, line 27.—For "vendor's default," read "vendee's."

„ 237, line 7 from foot.—For "receives," read "reserves."

„ 280, in Illustration.—For "*Hinch v. Liddell*," read "*Hinde v. Liddell*."

„ 283, line 5 from foot.—For "defendant," read "plaintiff."

* * The references throughout are to the last editions of Mr. Benjamin's and Lord Blackburn's treatises, viz. :

Benjamin on Sale (1888), 4th edition, by A. B. Pearson-Gee and H. F. Boyd.

Blackburn on Sale (1885), 2nd edition, by J. C. Graham.

EFFECT OF THE ACT ON THE PREVIOUS LAW.

A.—Certain Changes in the Law.

1. *Sect. 18, Rules 2 and 3, pp. 119, 124.*—The provision as to notice by buyer of acts done by seller to pass the property.

2. *Sect. 24 (2), p. 156.*—Overrules *Bentley v. Vilmont*, and *semble* restores the law of *Moyce v. Newington*; and in consequence repeals the Larceny and Summary Jurisdiction Acts, so far as they are inconsistent.

3. *Sect. 25 (1) (2), pp. 160, 166.*—Reproduces sects. 8, 9 of the Factors Act, 1889, with the omissions mentioned.

4. *Sect. 26 (1), p. 171.*—Addition of the word “hour” before “day, month, and year,” in the 29 Car. 2, c. 3, s. 16.

5. *Sect. 29 (4), p. 186.*—“A reasonable hour” is made a question of fact; and the rules in *Startup v. Macdonald* (1844), 6 M. & G. 593, are abrogated. See also sect. 56.

6. *Sect. 51 (3), p. 284.*—English rule as regards profits as damages applicable to Scotland, and *Dunlop v. Higgins* (1848), 1 H. L. 381, is overruled.

7. *Sect. 52, p. 284.*—The words “or ascertained” added after “specific.” “Price in money” is also omitted, but no change appears to have been made thereby.

B.—Submitted Changes in the Law.

1. *Sect. 4, p. 21.*—The words “things attached to, &c. the land . . . agreed to be severed,” as part of the definition of “goods,” has probably abrogated *Rodwell v. Phillips* (1842), 9 M. & W. 502, and similar cases, and *Lavery v. Pursell* (1888), 39 Ch. D. 508; and has extended *Marshall v. Green* (1875), 1 C. P. D. 42.

The law laid down in *Lee v. Gaskell* (1876), 1 Q. B. D. 700, would also appear to be changed in cases where fixtures are sold to a person not an incoming tenant.

2. *Sect. 4, p. 46.*—The rule in *Egerton v. Matthews* (1805), 6 East, 307 (if really existing at the date of the Act), with regard to the statement in the memorandum of the fact of *agreement*, would appear now to be assimilated to that in *Wain v. Warlters* (1804), 2 S. L. C. (9th ed.) 266, by virtue of the substitution of the word “contract” for “bargain.”

3. *Sect. 24 (1), pp. 156, 157.*—The necessity of the offender being prosecuted “by or on behalf of the owner,” as under previous Acts, is apparently done away with.

4. *Sect. 41 (2), p. 222.*—The seller’s lien, after his attornment to the buyer, is not now confined to cases of the buyer’s *insolvency*, as it seems to have been previously.

C.—Apparent Additions to, or New Statements of, the Law.

1. *Sect. 2, p. 9.*—Rule as to “actual requirements” extended to all persons under incapacity.

2. *Sect. 12 (1) (2), p. 79.*—Two new *warranties* of title are here added.

3. *Sect. 20, p. 143.*—The previous rule with regard to risk where the passing of the property is delayed, is here extended to delay in *delivery*. And the delay must be the *possible*, and not the *direct* cause of the loss.

4. *Sect. 29 (1), p. 181.*—Previously assumed rule as to place of delivery definitely stated, with the addition (when the sale is of specific goods) of the necessity of knowledge by the parties of their locality.

5. *Sect. 29 (5), p. 187.*—Rule as to the expenses of putting the goods in a deliverable state first stated, apparently on the authority of an American decision.

6. *Sect. 32 (3), p. 198.*—Addition to the law of England and Ireland of the Scotch rule as to seller's duty in a delivery involving a sea transit.

7. *Sect. 45 (2), p. 244.*—Parke's (B.) opinion that even a wrongful possession by buyer ends the transit is here definitely adopted.

8. *Sect. 46 (1), p. 252.*—Incidence of the expenses of re-delivery after stoppage stated for first time.

9. *Sect. 47, p. 255.*—Lord Selborne's opinion in *Kemp v. Falk* that a sub-buyer's purchase-money cannot be stopped when the right of stoppage is defeated is adopted against the opinion of the judges in *Ex parte Golding, Davis & Co.* and *Ex parte Falk*.

10. *Sect. 58 (4), p. 299.*—Supposed rule of equity as to the employment of one puffer adopted.

D.—Doubtful Points.

1. *Sect. 2, pp. 13, 14.*—Is a person under incapacity liable (apart from the Act) for necessities which are not delivered?

2. *Sect. 2, p. 17.*—Is there any change in the law as to the *time* of the calculation of “actual requirements”?

3. *Sect. 5 (3), p. 58.*—Will the potential existence of some future goods now be recognized?

4. *Sects. 16, 18, pp. 111, 129.*—What is the definition of “ascertainment”?

5. *Sect. 19 (3), pp. 140, 141.*—Must the bill of lading be taken to order when sent forward with bill of exchange? And do the words “transmits to the buyer to secure,” cover a direct transmission to him?

6. *Sect. 24 (2), p. 156.*—Is the order of restitution affected?

7. *Sect. 26, p. 171.*—Is the criminal procedure against a sheriff under sect. 29 of Sheriffs Act, 1887, saved by sect. 57 of this Act?

8. *Sect. 43 (1) (b), p. 225.*—*Qy.* effect of the word “lawfully”?

9. *Sect. 48 (2), p. 265.*—Can a second buyer from the seller obtain a good title when the buyer is *not* in default?

THE SALE OF GOODS ACT, 1893.

[56 & 57 VICT. c. 71.]

An Act for codifying the Law relating to the Sale of Goods.

[20th February, 1894.]

BE it enacted as follows:—

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1.—(1.) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

S. 1.
Sale and
agreement
to sell.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

A contract of sale . . . is a contract.—A contract of sale, which is defined by s. 62 (1) to include an agreement to sell as well as a sale, consists of four elements, of which two, viz.:

S. 1 (1).

S. 1 (1). (1) parties competent to contract; and (2) mutual assent, are common to all other contracts; and two, viz.: (3) a thing, the property in which is to be transferred; and (4) a money consideration called the price, are peculiar to itself. The two latter heads are dealt with below, and (1) in s. 2. Particular instances of cases where there is no mutual assent to a sale are, *e. g.*, where there is a mutual mistake as to the existence of the goods, as when an article sold contains inside it another chattel unknown to the parties (*a*); or when one party is under a mistake as to the personality of the other, and never intends to deal with him (*b*); or when one party expressly refuses to contract with the other as a principal (*c*). So also an *award* that one person shall deliver to another goods on being paid, does not *of itself* amount to a mutual assent to a sale (*d*).

An assent to a sale may also be conditional, as where the goods are delivered, *e. g.*, on sale or return. In this case the same act of the buyer is an assent to the sale and a transfer of the property. Until then the buyer is a bailee (*e*).

See, generally, on mutual assent, Benj. pp. 42 *et seq.*

Whereby the seller transfers or agrees to transfer: see sub-s. 3, *post*, p. 6.

The property.—"The third essential is that there should be a transfer of the *absolute or general* property in the thing sold; for in law a thing may, in some cases, be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing" (*f*). This is provided for by the definition of "property," given in s. 62 (1). Thus, "when goods are delivered in pawn or pledge, the general property remains in the pawnor, and a special property is transferred to the pawnee" (*g*). Sect. 61 (4) excludes pledges from the operation of the Act.

A transfer of "the property," as defined by the Act, being thus essential to a contract of sale, the latter is distinguishable on this ground from (1) agency (*h*); (2) bailment (*i*); (3) contracts

(*a*) *Merry v. Green* (1841), 7 M. & W. 623; and in *America Huthmacher v. Harris*, 38 Penn. 491; cf. *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562.

(*b*) *Cundy v. Lindsay* (1878), 3 Ap. Ca. 459.

(*c*) *Rodliff v. Dallinger*, 55 Am. R. 439.

(*d*) *Hunter v. Rice* (1812), 15 East, 100.

(*e*) Benj. p. 67.

(*f*) Benj. p. 2, quoting *Jenkyns v. Brown* (1849), 14 Q. B. 496.

(*g*) Benj. *ibid.*; and see *Sewell v. Burdick* (1884), 10 Ap. Ca. 74.

(*h*) *Ex parte White* (1870), 6 Ch. 397; *Ex parte Bright* (1879), 10 Ch. D. 566.

(*i*) *South Australian Ins. Co. v. Randell* (1869), 3 P. C. 101. As to

in the form of a sale, but really of pledge, mortgage, &c. (*k*); (4) a contract for the supply of labour and materials; (5) a contract for the affixing of a chattel to land or another chattel. In every case the substance, and not the form of the contract, is to be regarded (*l*). S. 1 (1).

As regards the distinction between sales and contracts for work and materials, "there have been numerous decisions," says Mr. Benjamin (*m*), "and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are 'contracts for sale,' &c. . . . or contracts for work and labour done and materials furnished." And after citing cases to show the various tests which have been suggested to show the distinction, he says (*n*) (with reference to the rule laid down in *Atkinson v. Bell* (*o*)) that the question depends upon whether the employer or the workman furnishes the materials): "The first branch of the rule is undoubtedly correct, as shown by the principles settled in *Lee v. Griffin* (*p*), because when the materials are furnished by the employer, there can be no transfer to him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing *can* be due from him save compensation for labour; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labour done and materials provided. But the second part of the rule is inaccurate, as pointed out in *Grafton v. Armitage* (*q*) and *Lee v. Griffin* (*p*). A man may be responsible for damage done to another's chattel, as, for example, to a coachmaker's vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labour done, and materials furnished by the coachbuilder, although bestowed on a thing which is his and is to remain his after being repaired at another's expense."

the class of conditional sales which operate as bailments until the condition is accomplished, see s. 18, Rule 4, *post*, and notes thereon.

(*k*) These are expressly excluded from the Act, see s. 61 (4).

(*l*) See *In re Watson* (1890), 25 Q. B. D. 27.

(*m*) at p. 96.

(*n*) at p. 106.

(*o*) (1828), 9 B. & C. 568.

(*p*) (1861), 1 B. & S. 272. See also *Isaacs v. Hardy* (1884), Cab. & Ell. 287, at N. P.

(*q*) (1845), 2 C. B. 336.

S. 1 (1).

And with reference to the test suggested in *Clay v. Yates* (r), viz., whether the work and labour are of the essence of the contract, or the materials supplied, he says (s): "If the employer owned nothing whatever that went into the composition of the picture [i.e., one worth 300 guineas]—if neither materials, nor skill, nor labour were supplied by him, it is obvious that he cannot get title to the picture, or any property in it, except through the transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw materials and the skill, are divided; it is not the less true that none of these elements were owned by the employer before the contract, and that the chattel composed of them is, by the terms of the contract, to be transferred for a price by the former owner to the employer."

Cases, e.g., where an attorney prepares a deed, &c., and supplies paper, are explainable on the principle that "such matters [i.e., the materials necessary] cannot be considered as having entered into the contemplation of parties when contracting" (t). In these cases *de minimis non curat lex*.

Accordingly the true test remains, as deduced from *Lee v. Griffin* (u): Is the contract intended to result in the transfer for a price from one party to the other of a chattel in which the other had no previous property? If so, it is a contract for the sale of a chattel (x).

for the affixing to the freehold, &c., of moveables.

In the same way contracts of sale must be distinguished from contracts for the affixing to the freehold or to another chattel of a moveable thing of any kind. "In such contracts the intention is plainly not to make a sale of moveables, but to make improvements on real property [or on another chattel]" (y). In other words, the complete thing sold is never sold as a chattel, nor are its incomplete materials, though chattels, sold at all in the incomplete state (z).

Before leaving this part of the subject it may be mentioned that, when the mutual intention to transfer the general property in a thing is clear, or is to be presumed, the transaction will be considered a sale. Thus, although the parties call it a guaranty

(r) (1866), 1 H. & N. 73.

(s) p. 107.

(t) Benj. p. 108.

(u) (1861), 1 B. & S. 272.

(x) See Benj. p. 105.

(y) Benj. p. 108, quoting *Tripp v. Armitage* (1839), 4 M. & W. 687;

Clark v. Bulmer (1843), 11 M. & W. 243. With regard to the words in brackets, see *Anglo-Egyptian Nav. Co. v. Rennie*, (1875), L. R. 10 C. P. 271.

(z) Per Cur. in *Clark v. Bulmer*, *supra*, at p. 250.

or agency in order to evade the revenue laws (*a*), or although their governing motive was that one party should have a right to the chattel as security for a loan (*b*). S. 1 (1).

In goods.—These are defined in s. 62 (1). The law specially applicable to such things as emblements, fixtures, &c., is discussed in the notes to s. 4, *post*, p. 23, with reference to the provisions of that section.

“Goods” are further subdivided into “existing” and “future” (see s. 62 (1)) goods in s. 5. See also ss. 6 and 7.

To the buyer, for a money consideration called the price.—“It must be money, paid or promised, accordingly as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter (*c*). So also goods may be given in consideration of work and labour done, or for rent, or for board and lodging (*d*), or any valuable consideration other than money; all of which are contracts for the transfer of the absolute and general property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties are generally, but not always, the same as in the case of sales (*e*). If no valuable consideration be given for the transfer, it is a gift, not a sale” (*f*).

But the consideration need not consist wholly of a price. If part of the consideration be money, it is a sale (*g*).

The price may be fixed by the contract, or be ascertained afterwards. See ss. 8, 9, *post*, p. 61.

Between one part owner and another.—This clause would more properly be included under the definition of capacity in s. 3. It applies to partners as well as part owners (*h*). Thus, one part owner of a ship can sell his share to another (*i*), and a firm

(*a*) *Hutton v. Lippert* (1883), 6 Ap. Ca. 309.

(*b*) *McBain v. Wallace* (1882), 6 Ap. Ca. 588; but see s. 61 (4), and note thereon.

(*c*) *Harrison v. Luke* (1845), 14 M. & W. 139. The Act does not apply to contracts of exchange; cf. s. 5 of the Factors Act, 1889 (Appendix, *post*).

(*d*) See an example in *Keys v. Harwood* (1846), 2 C. B. 905.

(*e*) See *Emmanuel v. Dane* (1812), 3 Camp. 299 (warranty on barter); *La Neuville v. Nouras* (1813), 3 Camp. 351 (*caveat emptor*).

(*f*) Benj. pp. 2, 3. A gift of chattels, not made by deed, does not pass the property without delivery; herein it differs from a sale. See *Cochrane v. Moore* (1890), 25 Q. B. D. 557; and cf. *Kilpin v. Rattey*, [1892] 1 Q. B. 582.

(*g*) *Sheldon v. Cox* (1824), 3 B. & C. 120; *Hands v. Burton* (1809), 9 East, 349; *Bull v. Parker* (1843), 7 Jur. 282.

(*h*) For the difference between the two, see Lindley on Partnership (ed. 1893), pp. 25 *et seq*.

(*i*) *Boed v. Blandford* (1828), 2 Y. & J. 278.

S. 1 (1). may exercise the rights of an unpaid seller under ss. 38 *et seq.* against the buyer, a member of the firm (*k*).

S. 1 (2). A contract of sale may be absolute or conditional.—“Absolute” appears to be used in the sense of “unconditional,” the “pure et simple” of the French Civil Code, s. 1584.

“Conditions” are divided into suspensive or precedent, and resolute or subsequent. In the former case “the liability to perform the promise does not arise till a certain thing has happened, or a certain time has elapsed.” In the latter, “the liability is discharged by the non-fulfilment” (*l*).

The term “condition” appears to include two classes of conditions, whether precedent or subsequent:—

(1.) Conditions properly so called, or terms or representations of, or in the contract, express or implied:

(2.) Contingencies or collateral events out of the control of either party.

Instances of (1) are to be found in ss. 10—15 (implied conditions precedent of quality); ss. 16—19 (implied conditions precedent to vesting of property); s. 28 (implied concurrent conditions of delivery and payment); ss. 30, 31 (implied conditions precedent as to quantity); *Beer v. Walker* (*m*) (implied condition subsequent of merchantableness on arrival, under ss. 14 (2), 33); *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (*n*) (implied condition subsequent of non-completion of delivery under s. 30 (1)); s. 34 (implied conditions precedent to acceptance); s. 48 (4) (express condition subsequent for re-sale on default).

Instances of (2) are s. 5 (2) (express condition precedent of acquisition of goods by seller); s. 6 (implied condition precedent of existence of goods); s. 7 (implied condition subsequent of continued existence of goods); s. 9 (valuation an implied condition subsequent to sale).

Cases falling under s. 6 should, however, more properly be considered cases of mutual mistake under s. 61 (2).

S. 1 (3). Property . . . is transferred—Transfer . . . is to take place.—These words respectively contemplate the distinction between what was called “a bargain and sale” at common law, and “an executory agreement” or “an executory contract of sale.” In the former case, the contract was *itself* also a conveyance of the

(*k*) *Ex parte Cooper* (1879), 11 Ch. Blaks (1662), 1 Lev. 88.

D. 68. (*m*) (1877), 25 W. R. 880.

(*l*) Anson on C. (5th ed.) p. 301. (*n*) (1886), 12 Ap. Ca. at p. 140.
See the curious old case of *Elliott v.*

property, or (as the phrase ran) it was executed: in the latter case the conveyance was postponed. The Act calls these two cases "a sale" and "an agreement to sell" respectively. On this question, Mr. Benjamin makes the following instructive remarks (o):—

S. 1 (3).

"A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general estate of the other in case of default (*p*), but having no effect to transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities of an owner (*q*); and this is an 'Executory Agreement.' Or it may be a perfect sale, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves (*r*), independently of any personal remedy against the vendor for breach of contract (*s*), and rendering him liable to the risk of loss in case of their destruction (*t*); and this is a 'Bargain and Sale of Goods.'" And in another passage (*u*), he says:—

"In the one case, A. sells to B.: in the other he only promises to sell. In the one case, as B. becomes the owner of the goods themselves, as soon as the contract is completed by mutual consent; if they are lost or destroyed, he is the sufferer (*t*). In the other case, as he does not become the owner of the goods, he cannot claim them specifically (*r*); he is not the sufferer if they are lost (*t*), cannot maintain trover for them, and has at common law no other remedy for breach of the contract than an action for damages. Both these contracts being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it."

The rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass are given in s. 18, *post*.

At a future time, or subject to some condition.—Instances of contracts of sale where the vesting of the property is postponed till a future period, are contracts of "sale or return," "on approval," &c. (*x*).

(o) pp. 94, 95.

(*p*) See s. 50 (seller's rights), and s. 51 (buyer's rights).

(*q*) s. 20 (risk); s. 49 (payment of price); s. 50 (non-acceptance).

(*r*) s. 52.

(*s*) s. 51.

(*t*) s. 20.

(*u*) pp. 273, 274.

(*x*) s. 18, Rule 4 (b), *post*, p. 126.

S. 1 (3). With regard to conditions precedent to the vesting of the property, see notes to sub-s. 2, and cases in illustrations.

S. 1 (4). **Agreement to sell becomes a sale.**—"The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in *Rohde v. Thwaites* (y), 'the selection of the goods by the one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes' " (z).

ILLUSTRATIONS.

1. A. contracts to sell B. certain goods on condition that, on delivery, certain outstanding bills against A. should be taken out of circulation. This is "an agreement to sell" till the bills are taken up, and then a sale. *Bishop v. Shillito* (1819), 2 B. & A. 329 a.

2. A. delivers to B. furniture on hire, which is to become the property of B. when he pays all the instalments of the price. This is an "agreement to sell" until the price is fully paid, and then a sale. *Ex parte Crawcour* (1878), 9 Ch. D. 419.

3. A. contracts to sell B. goods on trial for two days. This is an agreement to sell, and becomes a sale when the two days elapse without disapproval by B. *Humphries v. Carvalho* (1812), 16 East, 45.

4. A. agrees to lend B. a musical box, on condition that B. pays for it if it is damaged in his possession. The box is damaged. The agreement becomes a sale when the box is damaged. *Bianchi v. Nash* (1836), 1 M. & W. 545 (a).

5. B. orders of A. a set of artificial teeth. A. takes a model of B.'s mouth and makes the teeth. This is a contract of sale and not for work and labour and materials, as the order was for a chattel to be delivered. *Lee v. Griffin* (1861), 1 B. & S. 272.

6. A. agrees to print for B. five hundred copies of a work, and find the paper therefor. This is a contract by A. to do work and to supply materials for B., as there is properly no chattel, the property in which is to be transferred from A. to B. *Clay v. Yates* (1856), 1 H. & N. 73 (b).

7. B. employs A., an engineer, to devise a place for curving metal tubing for the manufacture of a life buoy of which B. was the inventor. A. makes drawings of a machine, and makes a ring or mandrel and experiments with it for the purpose intended. This is a contract only for work and labour. *Grafton v. Armitage* (1845), 2 C. B. 336.

(y) (1827), 6 B. & C. 388. This was the case of an agreement to sell unascertained goods

(z) Benj. p. 318.

(a) This and similar cases have a double aspect: (1) B.'s assent to the contract of sale is given conditionally; (2) the same condition also applies to the passing of the property. See Benj. p. 67.

(b) It is pointed out by Mr. Justice Stephen and Sir Frederick Pollock, (L. Q. Review, vol. i. p. 10) that B.'s copyright in the book qualifies A.'s proprietary rights in the book when printed. B. therefore had an existing property in the chattel, and the case falls outside the rule stated on p. 4, ante.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. S. 2.
Capacity to buy and sell.

Provided that where necessities are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

“Necessaries” in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Capacity to buy and sell—*i.e.*, to enter into a contract of sale. The effect of the contract as regards the title transferred is regulated in ss. 21—26.

Persons as a general rule incompetent to contract are :—

1. Convicts (*c*).
2. Alien enemies, or subjects of a foreign state actually at war with this country (*d*).
3. Married women (*e*), who are now, under the Married Women's Property Act, 1882, competent to contract in respect of their separate property. Their capacity to bind their husbands forms part of the law of Principal and Agent, under s. 61 (2).
4. Infants.
5. Minors in Scotland.
6. Lunatics.
7. Drunkards.

It is proposed to consider the general law as to competency to contract for the sale of goods, whether necessities or not, as applicable to :—

- (1.) Infants.
- (2.) Minors (in Scotland).
- (3.) Lunatics.
- (4.) Drunkards.

Firstly, as regards infants.—“Infants are protected by law from liability on purchases made by them, except for necessities. Infants.”

(*c*) 33 & 34 Vict. c. 23, ss. 6, 8, 30. *Benj.* p. 497.
 (*d*) See *Poll. on C.* (5th ed.) p. 94; (*e*) *Benj.* pp. 34—41.

S. 2. The purchase by the infant, however, was not absolutely void, but only voidable in his favour" (f).

This was the common law rule. By the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, it is provided that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants . . . for goods supplied, or to be supplied (other than contracts for necessities) . . . shall be absolutely void." Sect. 2, dealing with ratifications, is, in the case of sales of goods, superfluous.

In spite of the generality of the above provisions, the maxim *quod fieri non debuit, factum valet* will, it is apprehended, apply in some cases, and things actually done under such void contracts of sale, such as the transfer of the property to, or payment by, an infant buyer, will not be invalidated. This was early decided in *Holmes v. Blogg* (g), where a payment made by an infant for a consideration he had actually enjoyed was held irrecoverable; and so in a late case (h) (where *Holmes v. Blogg* was not cited). And Lord Mansfield's opinion (i) was that a voluntary payment was, even without any enjoyment of the consideration, irrecoverable. See Prof. Pollock on the general question (j).

"But an infant is competent to purchase for cash, or on credit, a supply of necessities; and his purchase on credit will be valid even though it be shown that he had an income at the time sufficient to supply him with ready money to buy necessities suitable to his condition" (k); and his liability for necessities will extend to such goods purchased by him as a tradesman, but consumed for household purposes (l).

But the liability of the infant is on simple contract only. Thus, he is not liable on a bill of exchange, though given for necessities (m). But he is liable on a bond, without penalty, given for necessities, the form, however, of the contract being disregarded, and the obligation being treated as one on simple contract (n).

(f) Benj. p. 23, quoting (*inter alia*) *Gibbs v. Merrell* (1810), 3 Taunt. 307; *Hunt v. Massey* (1834), 5 B. & Ad. 902. See also *Williams v. Moor* (1843), 11 M. & W. 256.

(g) (1818), 8 Taunt. 508.

(h) *Valentini v. Canali* (1889), 24 Q. B. D. 166.

(i) In *Earl of Bucks v. Drury* (1761), 2 Eden, 60, quoted in *Holmes v. Blogg*.

(j) On C. (5th ed.) p. 63.

(k) *Burghardt v. Hall* (1839), 4 M. & W. 727; *Peters v. Fleming* (1840), 6 M. & W. 42.

(l) *Tuberville v. Whitehouse* (1823), 1 C. & P. 94.

(m) *In re Sollikoff*, (1891) 1 Q. B. 413.

(n) *Walter v. Everard*, (1891) 2 Q. B. 369, quoting *Russell v. Lee* (1662), Lev. 86; Coke, Litt. 172; Vin. Ab. *Enfant*, C. (7).

As regards the liability of an infant as a *seller* of goods, s. 1 of the Act above quoted would appear to have no application. S. 2 says "that no action shall be brought whereby to charge any person, upon any ratification made after full age of *any promise or contract* made during infancy," whether with a new consideration or not. Under the latter section the infant seller will be protected, though he may have ratified after majority. But it would seem that the contract would otherwise be enforceable by the infant against the buyer (*o*), and voidable by the infant as at common law.

S. 2.

In two early cases an infant was held not liable on the warranty of a horse (*p*), though fraudulent (*q*).

Secondly, as regards minors in Scotch law. See on this, Bell's Dict. p. 652; Ersk. Pr. (15th ed.) 94, 95; and Lor. Handb. s. 412; and Infants' Relief Act, 1874, quoted *supra*. Minors in Scotland.

Thirdly, as regards lunatics.—"As to lunatics and persons *non compos mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which govern such contracts when made by infants. There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase his mind was so deranged that he did not know or understand what he was doing. Still, if that state of mind, though really existent, be unknown to the other party, and no advantage be taken of the lunatic, the defence cannot prevail; especially when the contract is merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original position. In the case cited in the note (*r*), all the authorities will be found quoted and examined" (*s*). Lunatics.

Lord Esher, M.R., in a late case (*t*), shows that the limitations of the rule as stated above ("especially, &c.") are only, "*d fortiori*, arguments or matters of aggravation," and not essential.

Lopes, L.J., thus concisely states the law in the same case (*t*):—"Contracts made by a person of unsound mind are not voidable at his option if the other party to the contract believed him to be of sound mind at the time the contract was made. In order to avoid a fair contract upon the ground of insanity, the mental incapacity of the party seeking to avoid it must be known to the

(*o*) *Warwick v. Bruce* (1813), 2 M. & S. 205.

(*p*) *Houlett v. Haswell* (1814), 4 Camp. 118.

(*q*) *Green v. Greenbank* (1816), 2 Marsh. 486.

(*r*) *Moulton v. Camroux* (1848), 2

Ex. 487; 4 Ex. 17. As to what constitutes mental incapacity, see per Brett, L.J., in *Drew v. Nunn* (1879), 4 Q. B. D. 661.

(*s*) Benj. p. 33.

(*t*) *Imperial Loan Co. v. Stone*, (1892)

1 Q. B. 297.

S. 2. other contracting party. The defendant must plead and prove both insanity and the plaintiff's knowledge of it. *The burden of proving both the insanity and the plaintiff's knowledge of it lies on him.*"

"So far as relates to supplies of necessities to a person of unsound mind, there can be no question that, when no advantage is taken of his condition by the seller, the purchase will be held valid" (u). But the liability is one *quasi ex contractu*. "The term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But wherever necessities are supplied by a person who by reason of disability cannot himself contract, *the law implies an obligation* on the part of such person to pay for such necessities out of his own property. [But] the necessities must be supplied under circumstances which would justify the Court in implying the obligation" (x). The proviso above quoted would doubtless apply where the seller took advantage of the position of the lunatic (y).

Drunkards.

Fourthly, as regards drunkards.—"A drunkard, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract in general" (z). But his contract is not void, but voidable (a), if the other party knew (as must generally be the case) of the intoxication (b).

A drunkard, as above defined, would be liable for absolute necessities supplied to him while in that condition; and Pollock, C.B., put the ground of the liability as follows:—"A contract may be implied by law in many cases, even when the party protested against any contract. The law says he did contract, because he ought to have done so. On that ground the creditor might recover against him when sober, for necessities supplied to him when drunk" (c).

It will be seen from the above extract that Pollock, C.B., puts the liability of the drunkard as one *quasi ex contractu* in substantially the same terms as Cotton, L.J., applies to a lunatic in

(u) Benj. p. 24; *Baxter v. Portsmouth* (1826), 5 B. & C. 170; *Rhodes v. Rhodes* (1890), 44 Ch. D. 94, resolving the doubt which had been expressed in *In re Weaver* (1882), 21 Ch. D. 615.

(x) Per Cotton, L.J., in *Rhodes v. Rhodes*, *supra*.

(y) As in *Levy v. Baker* (1827), M. & M. 106, though this was not a case of necessities.

(z) Benj. p. 34, quoting (*inter alia*) *Moulton v. Camroux* (1848), 4 Ex. 17; *Pitt v. Smith* (1811), 3 Camp. 33. See also *Jenkins v. Morris* (1880), 14 Ch. D. 674 (lunacy).

(a) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132.

(b) *Imperial Loan Co. v. Stone* (a case of lunacy), (1892) 1 Q. B. 297, quoting *Gore v. Gibson*, *infra*.

(c) *Gore v. Gibson* (1846), 13 M. & W. 623; Benj. p. 34.

Rhodes v. Rhodes quoted above, and it is presumed that the limitation would also apply, viz., that if advantage be taken of the drunkard's condition, the obligation might not be implied (*d*).

Are sold and delivered to.—The obligation to pay for the goods incurred by the person under incapacity does not arise unless the contract be executed (1) by a transfer of the property, as in all cases; and (2) by delivery.

There must of course be a sale to the infant, &c., intended. The facts, however, may show that no obligation was intended, as in the case of a gift (*e*). So also the credit may be given, as before the Act, to the parent (*f*). The word "sold" is in this sub-section used in its popular sense: properly speaking, there can be no sale to an infant, as he can only subject himself to an obligation *quasi ex contractu*.

Secondly, there must be a delivery, i.e., the "contract" must be executed for the benefit of the buyer, before the price is payable. It would, therefore, seem that the buyer is not liable on any *undertaking* to pay for the goods *before* delivery, even though he expressly *undertook* to do so. With regard to infants, if the Infants' Relief Act, 1874, allowed such a contract, it must, it is submitted, be so far repealed. See the Act discussed, *post*, p. 14.

The infancy must be calculated at the time the property passes. Thus it has been held that, if the goods are delivered to a carrier when the buyer is an infant, a plea of infancy is good, though the buyer be over age at the time of actual delivery (*g*).

In this connection a question arises whether a buyer under disability is, or is not, liable for non-acceptance of necessaries. No case previous to *Rhodes v. Rhodes* (*h*) has been found which in any way throws light upon the point, and it is noticeable that Coke, in the extract which is the *locus classicus* on the subject (*i*), says, not that an infant may contract, but that he "may bind himself to pay for" necessaries. The latest case in which the grounds of the liability of persons under incapacity for necessaries are most clearly dealt with is *Rhodes v. Rhodes*, quoted *supra*. The language of the judgment of Cotton, L.J., appears to be carefully chosen; and, moreover, the Court expressly laid down the law as applicable to *all* persons under incapacity. It will be

Liability of
buyer under
disability for
non-accept-
ance of
necessaries.

(1) At com-
mon law.

(*d*) See remarks of Abbott, C.J., in *Baxter v. Portsmouth* (1826), 5 B. & C. 170 (a case of a lunatic).

(*e*) As in *Rhodes v. Rhodes* (1890), 44 Ch. D. 94 (a case of lunacy).

(*f*) *Mortimore v. Wright* (1840), 6 M. & W. 482.

(*g*) *Griffin v. Langfield* (1812), 3 Camp. 255.

(*h*) (1890), 44 Ch. D. 94.

(*i*) Co. Litt. 172.

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seen that Cotton, L.J., speaks of the "*supply*" of necessities, and of the *quasi contractual* obligation "to *pay* for such necessities out of his own property." The note running through all the judgments is that the obligation arises from a benefit *actually received*, and the consequent injustice that the goods should be unpaid for, if supplied on the faith of payment.

Having regard to the judgments in the above case, it is submitted that the sole liability at common law, of buyers under disability to contract, is to pay for the necessities when delivered. To imply a *quasi contractual* obligation to receive and accept necessities is a widely different thing from implying such an obligation when the benefit has been actually received. In the former case the necessities are not, it is submitted, "supplied" at all; but, however that may be, the Court would consider that the supply took place under circumstances in which they would not imply the obligation to accept or pay.

The words in Cotton, L.J.'s judgment, "out of his own property," should be noticed. They seem to show that the view of the Court was, that the liability of the buyer under disability should be treated as, in the words of Bowen, L.J., in another case, with respect to married women (*k*), a "proprietary," and not a personal liability. If this be so, an additional argument exists for the view above submitted.

(2) As regards infants under the Infants' Relief Act.

Such being, as it is conceived, the principles of the common law, the question remains whether the single case of infants has been affected by the Infants' Relief Act, 1874, which renders void "all contracts for goods supplied, or to be supplied (other than contracts for necessities)." Do the latter words mean contracts for necessities, with all the liabilities thereunder which are found in all contracts? or do they mean "contracts to pay for necessities supplied?" Having regard to the fact that the liability of an infant to accept necessities has never been dealt with in any reported case (which in itself is a strong argument against the implication of the liability), and to the tenor of the judgment in *Rhodes v. Rhodes*, and the way in which the obligation is stated by Coke (*supra*), the editors submit that "contracts for necessities" in the Infants' Relief Act must be construed as having the second meaning put upon them above; and, consequently, that, so far as any obligation to *accept* necessities is concerned, the contracts of infants are absolutely void.

If the above interpretation be correct, it will be seen that the present section of this Act merely affirms the previous law.

(*k*) *Scott v. Morley* (1887), 20 Q. B. D. at p. 128.

He must pay a reasonable price therefor.—“It is also said that an infant cannot, either by a parol contract, or a deed, bind himself, even for necessities, in a sum certain, and that should an infant promise to give an unreasonable price for necessities, that would not bind him. . . . Yet it hath been adjudged, and is admitted in several other books, that if an infant contract for necessities, and enter into a single bill for payment, that this shall bind him” (*l*); but the reasonableness of the price will, even in the case of a bond, be inquired into, just as if there had been only the simple contract (*m*). An infant cannot state an account; and it seems to follow that he has no consenting mind to agree to a definite price. And it appears to have been so decided in an early case (*n*), where it appeared that the necessities “could not be afforded for a less sum” than that charged. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. Sect. 8 (2), *post*, p. 61.

The Act extends to lunatics, &c., the rule which was previously applicable to infants. No cases have been found stating the previous rule applicable to others than infants.

Necessaries.—These are defined at the end of the section, the first part of the definition being based on *Peters v. Fleming* (*o*) and *Ryder v. Wombwell* (*p*). The question whether certain goods are necessities has hitherto generally been considered in connection with infants (*q*), but the Act now places infants, lunatics, and drunkards on the same footing. The term “necessaries” includes “articles purchased for *real use*, although ornamental, or distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one (*r*); and it was said by Alderson, B., in *Chapple v. Cooper* (*s*), after advisement, that ‘articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. . . . In all cases there must be *personal* advantage from the contract derived to the *infant himself*.’ The word ‘necessaries’ must, therefore, be regarded as a relative term, to be construed with reference to the infant’s age, state, and degree” (*t*).

(*l*) Bac. Ab. Infancy, c. 1, quoting Co. Litt. 172, and *Russell v. Lee* (1662), Lev. 86; Vin. Ab. Infant, c. 7.

(*m*) Per Lord Esher, M.R., in *Walter v. Everard*, [1891] 2 Q. B. 369, 373.

(*n*) *Pickering v. Gunning*, Vin. Ab. Infant, c. 10.

(*o*) (1840), 6 M. & W. 43.

(*p*) (1868), L. R. 4 Ex. 32.

(*q*) See, however, *Manby v. Scott* (1661), 1 Sid. 112, and *In re Rhodes* (1890), 44 Ch. D. 94; and Pope on Lunacy, 2nd ed. p. 257.

(*r*) *Peters v. Fleming*, *supra*.

(*s*) (1844), 13 M. & W. at p. 256.

(*t*) Benj. p. 24.

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And the Court, in *Ryder v. Wombwell* (t), say (quoting *Peters v. Fleming*):—"From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary for the support of life, but extended to articles fit to maintain the particular person in the state, degree, and station in life in which he is."

This question is one of fact for the jury, the function of the Court being to say whether there is *prima facie* evidence that the goods are necessities (u).

Actual requirements.

The latter words of the definition of necessities in this section, viz., "actual requirements at the time of the sale and delivery," reproduce in part the law for the first time definitely laid down in *Barnes v. Toye* (v) and *Johnstone v. Marks* (x), where it was held that evidence was admissible to show that, though the goods supplied were of the class of necessities, yet they were not necessities to the infant, as he was already sufficiently supplied. And in such case it is immaterial that the seller knew or did not know of such existing supply.

But the interpretation of the words themselves is difficult. The "actual requirements" of the buyer are to be determined, not, as was the case previously to the Act (y), at the date of the order, which is *prima facie* a reasonable rule, but "at the time of the sale and delivery." Now it is obvious that in many cases sale and delivery take place at different times, and it is hard to suppose that a section in a codifying Act was drawn to include only cases where sale and delivery took place at or about the same time, e.g., cases of sales over the counter.

The words, taken in their most grammatical sense, refer to one time, though they may, perhaps, without violation of grammar, refer to two separate times. In the latter case the meaning would be "time of sale and also that of delivery." The result would be that if the buyer was sufficiently supplied at either the time of the sale, or the time of delivery, the goods would not be necessities. Suppose, for instance, that, subsequently to the contract, and prior to the delivery, the buyer had been made a present of similar goods sufficient for his wants; or suppose the converse case, that he was sufficiently supplied at the time of sale, but

(t) *Ryder v. Wombwell* (1886), L. R. 4 Ex. 32, at p. 38.

(u) *Ryder v. Wombwell*, *supra*. It was so laid down as early as *Rainsford v. Fenwick* (1670), Carter, 215, by Vaughan, C.J.

(v) (1884), 13 Q. B. D. 410.

(x) (1887), 19 Q. B. D. 509.

(y) Per Lopes, L.J., in *Barnes v. Toye*; Brett, M.R., in *Johnstone v. Marks*, however, speaks of "the time of the additional supply," which may mean "time of delivery." In *Ford v. Fothergill* (1794), 1 Peake, 301, the previous supply existed at the time of the order.

previous to delivery the existing supply was, *e.g.*, burnt in a fire. Would the goods ordered in both cases not be necessities?

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Another interpretation may be suggested by reading the word "and" as "or." In this case the result seems strange, though not so hard upon the seller. Here he would be enabled to recover the price of necessities if at either of the above times the buyer had "actual requirements."

On the best consideration that the editors have been able to give to this difficult clause, they submit that the section must be taken, either as referring only to cases where sale and delivery take place *uno ictu* (with, however, the disadvantage above pointed out); or that the words must mean the time *when the transaction becomes a sale and delivery*, in other words, the time of delivery or supply. If this interpretation changes (as it seems to do) the previous law, the change is small, being only from the time of order to that of delivery; and the disadvantages, entailed by reading the words as referring to two separate times, are avoided. The meaning may, it is submitted, be not unreasonably elicited from the grammar of the words within the meaning of the canon of construction laid down by Lord Wensleydale, in *Grey v. Pearson* (2). "The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further."

Under the above construction it would seem that where the goods are delivered to a carrier for transmission, the requirements of the buyer must be considered at that time. The status of the infant has, at any rate, been decided to date from that time (a).

ILLUSTRATIONS.

1. A., a jeweller, sells to B., an infant undergraduate at the University, and the son of a gentleman of fortune and M.P., a watch-chain for 2*l.* 2*s.*, a pin at 9*s.*, and four or five rings at about 1*l.* a-piece. The jury find that all the things are necessities. There is evidence as a matter of law that the two first articles are, having regard to the condition in life of B., necessities as being suitable to such condition. It is doubtful whether the other articles are such. *Peters v. Fleming*, (1840), 6 M. & W. 42.

2. A., a tailor, supplies B., an infant captain in the army, with uniform and other clothes. B. is in receipt (in addition to his pay) of an allowance of 500*l.* a year. This latter fact does not prevent the

(2) (1857) 6 H. L. C. at p. 106; (a) *Griffin v. Langfield* (1813), 3 cited by Jessel, M. R., in *Ex parte Camp*. 255. *Walton* (1881), 17 Ch. D. at p. 751.

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3. A. supplies B., an infant captain in the army, with a livery for his servant, and cockades for the soldiers of his company. It being suitable to B.'s condition that he should have a servant, a livery was necessary: but the cockades are not necessities. *Hands v. Slaney* (1800), 8 T. R. 578.

4. A. supplies B., the son of a baronet, and with an allowance of 500*l.* a year, and entitled on majority to 20,000*l.*, with a pair of jewelled solitaires worth 25*l.*, and an antique goblet worth 15*l.* 15*s.*, intended as a present to a third person. Neither of these articles is a necessary. *Ryder v. Wombwell* (1868), L. R. 4 Ex. 32.

Formalities of the Contract.

Contract of
sale, how
made.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

S. 3. Subject to the provisions of this Act.—See s. 4 (note or memorandum, &c.); and s. 61 (3), which saves the enactments relating to bills of sale.

And of any statute—*e. g.*, Merchant Shipping Act, 1854, ss. 55—65 (bill of sale of ship); 31 Eliz. c. 12; and 2 & 3 Ph. & M. c. 7 (sale of horses): see s. 22 (2) of the present Act. For list of other statutes regulating sales of goods, see Benj. p. 537; these, unless expressly repealed by the Act, are saved by s. 61 (3).

A contract of sale may be made.—"By the common law all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on both parties" (b). "But the common law does not prohibit parties from making contracts of which only part is in writing. . . . Parol evidence may be used to show what were the additions or exceptions [*i. e.*, to or from a document], and the writing is conclusive as to the rest" (c).

(b) Benj. pp. 4, 5.

(c) Benj. p. 181.

In writing.—The meaning of the term “writing” will be found in s. 20 of the Interpretation Act, 1889. Where the writing is under seal, the contract is then called a bill of sale, i. e., an absolute bill. For an instance, see *Carr v. Burdiss* (*d*).

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Though the contract be in writing, trade usages, if consistent with the terms, are impliedly included (*e*), and also obligations which the law implies, as resulting from the written terms (*f*).

Or partly in writing.—If the words “with or without seal” are to be incorporated here, the clause would allow a contract of sale to be proved partly by the deed and partly verbally. Would it be competent to the parties having entered into a specialty, to vary it verbally, and thus make a *new* contract? (*g*). Where parol evidence is otherwise admissible, the fact that the instrument is under seal forms no insuperable objection to its reception (*h*).

Or may be implied from the conduct of the parties.—“The assent of the parties to a sale need not be express. It may be implied from their language (*i*), or from their conduct (*k*); may be signified by a nod, or a gesture, or may even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman’s counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods” (*l*).

Various instances of implied contracts will be found in the illustrations given on the next page.

Whether or not the “implied” contract of sale under this section is or is not intended to cover cases which may be described as *quasi* contracts (in other words, to include contracts “implied by law” as well as “inferred” from facts or conduct), it seems most convenient to refer to them under this section (*m*). These cases would appear to give rise to *quasi* contractual obligations.

Quasi contracts.

They may be shortly summed up as follows:—

(1.) The owner of goods may adopt a tortious sale made by

(*d*) (1835), 1 C. M. & B. 782.

pp. 577, 595.

(*e*) Per Parke, B., in *Hutton v. Warren* (1836), 1 M. & W. at p. 475.

(*i*) *Joyce v. Swann* (1864), 17 C. B. N. S. 84 (grumbling assent).

(*f*) Blackb. p. 41.

(*k*) *Brogden v. Met. Ry. Co.* (1877), 2 Ap. Ca. 668.

(*g*) See *Nash v. Armstrong* (1861), 10 C. B. N. S. 259.

(*l*) Benj. pp. 42, 43.

(*h*) See notes to *Wigglesworth v. Dallison*, 1 Sm. L. C. (9th ed.),

(*m*) As to implied contracts of sale, see Benj. p. 57.

S. 3.

another to a third party, treating the seller as his agent, and waive the tort (*n*).

- (2.) The owner of goods who has sold them to an insolvent buyer by reason of the fraud of a third person, who afterwards obtains possession of the goods from the insolvent, may treat the transaction as a sale to the third person through the insolvent as his agent (*o*).
- (3.) When a person who, in an action for the conversion or detention of goods, recovers their full value as damages, and the judgment is satisfied (*p*), the transaction amounts to a sale of the goods from the date of the satisfaction, to the defendant (*q*).
- (4.) A wife, who is insufficiently supplied with necessaries, may contract, as the husband's agent of necessity, for the supply of them with a third person (*r*).

Provided.—For the law relating to the contracts of corporations, see Pollock, &c. on Contracts (5th ed.), pp. 145—155; and Lindley on Companies (5th ed.), pp. 220 *et seq.*

ILLUSTRATIONS.

1. B. writes to A. ordering a carriage with particular appointments, which he afterwards verbally modifies and adds to. The contract of sale is to be proved by B.'s letter and the subsequent verbal instructions. *Hoadley v. McLaine* (1834), 10 Bing. 482.

2. A. agrees to supply B. with furniture to the amount of 600*l.*, or 700*l.* payable half in cash, and half by bill at six months. When goods to the value of 88*l.* had been delivered, B. refuses to take any more, but retains the part delivered. There is a new implied contract of sale for 88*l.*, and B. is not entitled to the original credit. *Bartholomew v. Markwick* (1863), 15 C. B. N. S. 710.

3. A. agrees to sell goods to B. on the valuation of C. and D., but before valuation B. consumes the goods. There is an implied contract by B. to pay the reasonable worth of the goods. *Clarke v. Westrope* (1856), 18 C. B. 765 (*s*).

4. B. sends A. the draft of an agreement to form the basis of a formal contract for the supply of coals by A. to B. A. fills up blanks and makes modifications, and writes "approved" at the end, and then returns to B. No formal document is executed by either party, but

(*n*) *Smith v. Hodson* (1791), 4 T. R. 211; 2 Sm. L. C. (9th ed.) p. 138.

(*o*) *Hill v. Perrott* (1810), 3 Taunt. 274; *Abbott v. Barry* (1820), 2 B. & B. 369.

(*p*) *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584.

(*q*) *Cooper v. Shepherd* (1846), 3 C. B. 266; *Ex parte Drake* (1877), 5 Ch. D. 866. This would seem an illustration of the ordinary principle

(seen in cases of insurance) that a total indemnity for loss of a thing transfers the property and rights of the owner to the indemnified. See *Simpson v. Thompson* (1877), 3 Ap. Ca. 279.

(*r*) *Eastland v. Burchell* (1878), 3 Q. B. D. 436; the rules relating to the law of principal and agent are saved by s. 61 (2).

(*s*) See s. 9.

coals are supplied by A., and payments are made to him by B. according to the terms of the draft. The circumstances show a contract of sale on the terms of the draft. *Brogden v. Met. Ry. Co.* (1877), 2 Ap. Ca. 668.

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5. B. orders of A. two dozen port, and two dozen sherry. A. sends four dozen of each. B. retains one dozen sherry and one bottle of port, returning the rest. This is a sale by A. to B. of the wine retained. *Hart v. Mills* (1846), 15 M. & W. 85 (t).

6. A. agrees to supply B. with two hundred and fifty bushels of wheat deliverable over a certain period, but delivers only one hundred and thirty bushels. B. keeps them after the expiration of the period. This is a contract of sale of the part retained (t). *Oxendale v. Wetherall* (1829), 9 B. & C. 386.

7. B. guarantees to A. the sale of certain goods for 9,000*l.* by a certain date, and A. agrees to give B. an irrevocable power of attorney allowing B. to deal with the goods as he pleased. B. also agrees to take over the goods at 9,000*l.* if not sold at that date. The transaction amounts to a sale of the goods to B., though it was called a guaranty. *Hutton v. Lippert* (1883), 8 Ap. Ca. 309.

8. A. delivers goods to B. with a price list, B. to sell them at his own price and account therefor at the first price, and B. also to be at liberty to alter the goods. This is a contract of "sale or return" by A. to B. *Ex parte White* (1870), 6 Ch. 397.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Contract of sale for ten pounds and upwards.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any

(t) See s. 30 of this Act.

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act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

This section reproduces in a slightly amended form s. 17 of the Statute of Frauds, which is repealed by s. 60 (see schedule of repealed enactments at the end of the Act).

Before considering its provisions in detail, one preliminary rule should be first stated, viz., the satisfaction relied upon of the requirements of this section must take place *before action brought*, "that is to say, that when one of these requirements is satisfied, the agreement *then* becomes enforceable by action" (u); there must, "in order to sustain the action, be a good contract in existence at the time of action brought; and to make it a good contract . . . there must be one of the three requisites" (x). As regards the memorandum, this was decided to be the law as long ago as 1841 in the case of *Bill v. Bament* (x), and also in a late case (y). Even disregarding judicial dicta, the conclusion from logic and common sense is irresistible that the same rule applies to the other requisites of the section. There is, however, no express decision applying to the latter.

The above rule appears at first sight inconsistent with the theory (to be mentioned later on) that the present section, as regards the memorandum, deals not with the contract itself, but only with *evidence* of it. But "it may well be," says Lord Esher in *Lucas v. Dixon* (y), "that the legislature intended to prevent persons being vexed with actions that could not succeed." And Fry, L.J., says in the same case (though he calls the conclusion "singular"), "The statute requires the memorandum *as evidence*, but requires the evidence to be in existence at the commencement of the action" (z).

One further point should be mentioned in connection with these requirements of the section, and that is, that, though the effect of all of them, as rendering the contract enforceable by action, is the same, yet that the memorandum stands in some respects on a different footing from the others. The memorandum must necessarily declare all the material terms of the contract; the

(u) Per Williams, J., in *Bailey v. Sweeting* (1861), 9 C. B. N. S. 843.

(x) Per Parke, B., in *Bill v. Bament* (1841), 9 M. & W. at p. 40.

(y) *Lucas v. Dixon* (1889), 22 Q. B. D. 357.

(z) See also per Lindley, L.J., in *In re Hoyle*, [1893] 1 Ch. at p. 97.

others merely show the relation of seller and buyer. See *post*, p. 31, s. v. "Acceptance."

S. 4.

A contract for the sale.—Prior to Lord Tenterden's Act (9 Geo. 4, c. 14, s. 7) there had been many conflicting decisions on the question whether the Statute of Frauds applied to executory agreements, as well as to bargains and sales. By that Act (which is re-enacted in sub-s. 2 of this section) the provisions of the original statute were extended to executory agreements, the two Acts being by implication incorporated, with the effect of substituting the word "value" for "price" in the Statute of Frauds (*a*). "Value" now appears in the present section.

S. 4 (1)

With regard to the distinction between contracts of sale and contracts for work and materials, or for the affixing of a chattel, see notes to s. 1, *ante*, pp. 3, 4.

In this connection it has been decided (*b*), that any stipulation for the resale by the buyer to the seller of goods, forming a term of an entire and enforceable contract for the sale thereof to the buyer, is not "a contract of sale" so as to separately require to be rendered enforceable by acceptance, &c.

Of any goods.—Defined in s. 62 (1) as including "all chattels personal other than things in action and money . . . emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale."

The term would thus include all corporeal moveable property, and would not include incorporeal rights or property, such as—

- (1) Scrip (*c*), shares (*d*), and stocks (*e*).
- (2) Documents of title (*f*).
- (3) Tenants' fixtures sold as unsevered (*g*).

In the latter part of this interpretation clause are included various things with which, previously to the Act, a number of cases have been concerned, with some conflict of authority. Under the words "emblements, industrial growing crops" are included all that class of productions of the earth which is known as *fructus industriales*, emblements being only such as

(*a*) Per Jervis, C.J., in *Harman v. Reese* (1856), 18 C. B. 587.

Colonial Bank v. Whinney (1885), 30 Ch. D. 261.

(*b*) *Williams v. Burgess* (1839), 10 A. & E. 499.

(*e*) *Heseltine v. Siggers* (1848), 1 Ex. 856.

(*c*) *Knight v. Barber* (1846), 16 M. & W. 66.

(*f*) *Freeman v. Appleyard* (1862), 32 L. J. Ex. 175 (goods within Factors Act).

(*d*) *Humble v. Mitchell* (1839), 11 A. & E. 205; *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Bradley v. Holdsworth* (1838), 3 M. & W. 422;

(*g*) *Lee v. Gaskell* (1876), 1 Q. B. D. 700. See notes on p. 27, *infra*, on this point.

S. 4 (1).

ordinarily produce, under labour and manurance, a crop within the year of sowing (*h*); whereas "industrial growing crops" appear to include the larger class of industrial crops, though not necessarily annual.

Emblements.

First, as regards *emblements*. The law prior to the Act is thus stated by Mr. Benjamin at p. 121 :—"Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds." And at p. 123 :—"Whether *fructus industriales*, while still growing, are not only chattels, but 'goods, wares, and merchandise,' has not, it is believed, been directly decided. Both Bayley, J., and Littledale, J., expressed an opinion in the affirmative in *Evans v. Roberts* (*i*). Lord Blackburn, on the contrary, says that the proposition is 'exceedingly questionable,' and that no authority was given for it in *Evans v. Roberts*." But later, Brett, J., says, in *Marshall v. Green* (*k*), that a sale of *fructus industriales* to be taken away by the buyer (*i.e.*, where the property is to pass before severance) is only a sale of "goods," though the crops be immature.

The Act appears to have adopted the latter view of the law, so that, in the future, a sale of emblements, whether mature or immature, and whether the property is to pass before or after severance, is only a sale of "goods."

Industrial growing crops.

Secondly, with regard to *industrial growing crops*. This term, it is apprehended, is meant to include that class of crops above referred to, *i.e.*, produced by the labour of man, though not technically falling under the denomination of "emblements." As Mr. Benjamin says, at p. 125, "there is an intermediate class of products of the soil, not annual, as emblements, nor permanent, as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, &c."

Groves v. Weld (*l*) appears to establish the following propositions, that, previously to the Act, industrial growing crops, as distinguished from emblements, were :—

- (1) Crops ordinarily yielding profit beyond the expiration of a year from the date of sowing,

(*h*) Per Cur. in *Groves v. Weld* (1833), 5 B. & Ad. 105.

(*i*) (1826), 5 B. & C. at p. 836.

(*k*) (1875), 1 C. P. D. at p. 42.

(*l*) (1833), 5 B. & Ad. 105.

- (2) Successive crops after the first, unless each of such crops required labour, manurance, or expense for their cultivation—as hops—in which case they would be emblements till exhausted. S. 4 (1).

Both classes would appear to be *fructus naturales* (*m*), but they are, while growing, considered by the Act as “goods.” The Act has not expressly touched the case of an agreement to sell the future produce of land not in existence at the date of the contract. Such a case was treated, in *Watts v. Friend* (*n*), as a sale of goods, the property passing after severance. Under the Act it would be “future” goods, *i.e.*, “things forming part of the land,” under s. 62 (1).

Thirdly, with regard to “things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale.” Things attached to, &c., the land.

These words are intended principally to meet the case of *fructus naturales* and *fixtures*.

With regard to the former class, the law, prior to the case of *Marshall v. Green* (*o*), is thus stated by Mr. Benjamin:—“Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the buyer before severance, is governed by the 4th section [of the Statute of Frauds]; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods . . . governed by the 17th, and not by the 4th, section of the statute.”

All the cases previous to *Marshall v. Green* (*o*) were in harmony with the above principle. In that case it was decided that a sale of growing timber, to be taken away *by the buyer as soon as possible*, was a sale only of *goods*, although it was admitted that the property passed to the buyer before severance. Here *Smith v. Surman* (*p*) was cited; but there the timber was sold *at so much a foot*, and was to be cut by the seller, the property accordingly passing *after severance*. The Court held this distinction to be immaterial.

This case stands by itself, and was criticised by Chitty, J., in *Lavery v. Pursell* (*q*), where a house had been sold as building material, to be removed *by the buyer* within two months. After saying that a standing tree (as in *Marshall v. Green*) was “just as much a hereditament as a house which was standing on the

(*m*) Benj. p. 128; *Groves v. Weld*, (1833) 5 B & Ad. 105.

(*n*) (1830), 10 B. & C. 446.

(*o*) (1875), 1 C. P. D. 42.

(*p*) (1829), 9 B. & C. 561.

(*q*) (1888), 39 Ch. D. 508; and cf.

Ronayne v. Sherrard (1877), 11 Ir. R.

C. L. 146, 151.

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land, and just as much so as the mines which are underneath," Chitty, J., goes on to say that the judgment in *Marshall v. Green* "turned upon this, that [the judges] considered that, as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. . . . The true basis [of Brett, J.'s] judgment was . . . to be found . . . where he says, 'The contract is not for an interest in land, but *relates solely to the thing sold itself*.'" And Chitty, J., distinguishing *Marshall v. Green*, decided that the sale of the house was the sale of an interest in land.

The question remains whether the Act has made any change in the law. It is submitted that in some cases it has. The definition above quoted says that, "the things attached to or forming part of the land" must be "agreed to be severed before sale, or under the contract of sale." The words "before sale" would mean "before the bargain and sale is completed," and the law relating to such cases has apparently not been changed. But the difficulty lies in the interpretation of the concluding words. Having regard to the sections in which these words are elsewhere employed (see ss. 1 (3), 29 (2), 49 (1) and (2), 55), the words "under the contract of sale," seem to mean "by virtue of," or "in pursuance of the terms of," the contract of sale. It is noticeable that the Act does not say *who* is to sever, or *when* the severance is to take place, but lays stress only on the fact of the *agreement* as to severance pursuant to the contract. Now the severance must be by or on behalf of either the seller or the buyer. If the seller is to sever, his doing so would be an act to be done by the seller "for the purpose of putting the goods into a deliverable state" under s. 18, Rule 2, and the vesting of the property would be postponed accordingly. Therefore, in such cases the severance would be "agreed" to take place "before sale." If, on the other hand, the buyer is to sever (and, apparently, *at whatever time* he is to sever), the severance would take place by agreement under the contract of sale. It is with regard to the latter class of cases that it is submitted that a change in the law has been effected by the Act. The question appears to be, Have the parties to the contract *treated the subject-matter as chattels or goods*? Has the subject-matter become conventionally goods? If this interpretation be correct, the legislature has contemplated the result which Chitty, J., says, in *Lavery v. Pursell*, the Statute of Frauds did not effect. "If the intention of the parties prevailed, it might mean that [the house] is sold as a chattel; but the point still is that *it is not a chattel at the time of the sale*; and the Statute of Frauds, so far as I can see, does not enable parties

to say, 'We will agree to treat the thing as a chattel,' when in point of law it is a hereditament." Consequently, as the house in *Lavery v. Pursell* was "a thing attached to or forming part of the land," a sale of it in future, as building materials, would be a sale of goods, and the decision itself no longer law. The same result would follow with *Rodwell v. Phillips*(*r*) and other cases(*s*) relating to the sale of *fructus naturales* to be severed by the buyer under agreement, which, if the above interpretation is correct, must be taken to be no longer law.

S. 4 (1).

With regard to the latter class, *i.e.*, fixtures, the Act also **Fixtures.** appears to have made some change in the law. *Lee v. Gaskell*(*t*) decided that a sale by the tenant to his landlord of unsevered tenants' fixtures was neither a sale of an interest in land, nor a sale of goods. And Cockburn, C.J., also said, *obiter*, that the rule would be the same if the sale had been to any other person than the lessor. Whether or not this dictum accurately represents the law, or whether a contract for the sale of fixtures to a third person would be either an executory sale of goods, or a bargain and sale of chattels (like the analogous emblements), it is submitted that under the present Act the law would stand thus, *viz.*, that a contract for the sale of fixtures to be severed would be a contract of sale of "goods," whether or not the contract of sale amounted to an "agreement to sell" or to "a sale."

But the severance must take place pursuant to the contract, *i.e.*, as one of the terms of it. It seems doubtful how far the mere contemplation of a severance—as, for instance, where the sale is to a third person unconnected with the land, nothing, however, being said on the point—would amount to an "agreement" to sever. Possibly in such a case there would be an implied agreement to that effect.

If the fixtures are sold without such an agreement, as, *e.g.*, presumably in the case of an incoming tenant, the contract is apparently, as it was before the Act, not a sale of "goods." In such a case *Lee v. Gaskell* would appear still to be law.

Of the value of £10 or upwards.—These words include:—

- (1.) An entire contract for the sale of different goods (whether all are in existence or not), the aggregate value being 10*l.*(*u*):

(*r*) (1842), 9 M. & W. 502.

(*s*) *Carrington v. Roots* (1837), 2 M. & W. 248; *Crosby v. Wadsworth* (1805), 6 East, 602; *Scovell v. Boxall* (1827), 1 Y. & J. 396; *Teal v. Auty* (1820), 2 B. & B. 99.

(*t*) (1876), 1 Q. B. D. 700.

(*u*) *Elliott v. Thomas* (1838), 3 M. & W. 170; *Baldev v. Parker* (1823), 2 B. & C. 37; *Scott v. E. C. Ry. Co.* (1843), 12 M. & W. 33; *Bigg v. Whisking* (1853), 14 C. B. 195; *secus*, where contract not entire: *Price v. Lea* (1823), 1 B. & C. 156.

s. 4 (1).

(2.) An entire contract for the sale of goods and for other objects, the goods being of the value of 10*l.* (x):

(3.) A contract for the sale of goods at the time of unascertained value, but eventually of the value of 10*l.* (y):

For the general rule with regard to the entirety of contracts, see the notes to s. 31 (1), *infra*.

ILLUSTRATIONS ("of the value of 10*l.*").

1. B. agrees to buy of A. a mare and foal, above the value of 10*l.*, on condition that A. agisted them, and also another mare and foal belonging to B. for six weeks, and to pay a lump sum of 30*l.* This is a contract for the sale of goods of the value of 10*l.*, though agistment was also included in the contract, and A. cannot recover the 30*l.* unless B. accepts, &c. *Harman v. Reeve* (1856), 18 C. B. 587.

2. B. orders of A. some ready-made lamps, and an additional one to be manufactured. B. accepts and pays for the ready-made lamps, but refuses the other. The lamps are over the value of 10*l.* B.'s acceptance of the ready-made lamps makes the contract, being entire, enforceable as regards the other. *Scott v. E. C. Ry. Co.* (1843), 12 M. & W. 33.

3. B. agrees to supply A. with turnip seed, and A. agrees to sell B. the turnips produced therefrom at 1*l.* 1*s.* a bushel. The seed produces 240 bushels. This is a contract for the sale of goods which prove to be of the value of 10*l.* *Watts v. Friend* (1830), 10 B. & C. 446.

4. B. buys timber of A. at one place, and then goes with him to other places where he buys more timber. At the last place a memorandum of the sale of all the timber is drawn up. This is an entire contract for all the timber. *Bigg v. Whisking* (1853), 14 C. B. 195.

Shall not be enforceable by action (z).—The words of the Statute of Frauds were "shall not be allowed to be good," and the early decisions treated the contract under s. 17 as void as distinguished from contracts under s. 4, which uses the words "no action shall be brought." In *Bailey v. Sweeting* (a), however, Williams, J., said, that when s. 17 of the statute was satisfied "the contract became actionable"; and Lord Blackburn said, in *Maddison v. Alderson* (b), "I think it is now finally settled that the true construction of the Statute of Frauds—both the 4th and the 17th sections—is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." And a similar opinion was expressed by Brett, L.J., in *Britain v. Rossiter* (c).

In *Leroux v. Brown* (d) a distinction was drawn between the

(x) *Harman v. Reeve* (1856), 18 C. B. 587.

(y) *Watts v. Friend* (1830), 10 B. & C. 446.

(z) See the definition of "action"

given in s. 62 (1).

(a) (1861), 9 C. B. N. S. 843.

(b) (1883), 8 Ap. Ca. at p. 488.

(c) (1879), 11 Q. B. D. at p. 127.

(d) (1836), 12 C. B. 801.

phraseology of the 4th and 17th sections of the Statute of Frauds, and it was decided that the former dealt only with *procedure*, and not with the validity of the contract itself, and consequently a contract made abroad, though valid according to the *lex loci*, was unenforceable in this country if within s. 4. And though *Leroux v. Brown* has been alluded to by some judges as a difficult case to understand, it must now be considered as good law. "It is settled by the cases of *Laythoarp v. Bryant*(*e*), and *Leroux v. Brown*, that this section [the 4th] does not apply to the contract itself, but to the evidence of the contract"(*f*). *Leroux v. Brown* would therefore govern cases under s. 4 of this Act.

S. 4 (1).

As contracts of sale not satisfying the conditions of the present section are "unenforceable by action," it is "also clear that neither party can be held liable upon it indirectly in *any action* which necessitates the admission of the existence of the contract"(*g*). "The contract is not enforceable, either directly or indirectly, by *action at law*"(*h*). But the remarks above quoted point out by implication the limitation of the restriction. The remedy, either direct or indirect, by *action only* being taken away, it follows that (1) No remedy other than by action is affected: (2) Anything done in pursuance of such a contract may be the foundation of a new liability on a distinct contract or obligation *quasi ex contractu*: and (3) The contract may be looked at for the purpose of explaining anything done under it(*i*).

Remedies of the parties *inter se*; and

The principles above quoted are stated by Prof. Pollock with reference to s. 4 of the Statute of Frauds; but, as the terms of s. 4 of the Act are similar, it is apprehended that these principles would apply, so far as the facts allow, to cases under the latter. Thus, it is submitted (1) that the seller, having several debts against the buyer, may appropriate moneys paid him by the buyer without appropriation, to his debt under an unenforceable contract of sale: see the analogy of the Tippling Act(*k*); (2) that the seller could recover against the buyer on an *account stated*(*l*); and (3) that the *execution* of an unenforceable contract would be good by way of accord and satisfaction(*m*). Cases falling under

(*e*) (1836), 2 Bing. N. C. 735.

(*f*) Per Smith, L.J., in *In re Hoyle*, [1893] 1 Ch. 84, 100. See also per Lindley and Bowen, L.JJ.

(*g*) Per Brett, L.J., in *Britain v. Rossiter* (1879), 11 Q. B. D. at p. 128.

(*h*) Per Cotton, L.J., *ibid.* at p. 130.

(*i*) See Pollock on C. (5th ed.)

ch. 13.

(*k*) *Philpott v. Jones* (1834), 2 A. & E. 41; *Cruikshanks v. Rose* (1831), 1 Moo. & R. 100.

(*l*) *Cocking v. Ward* (1845), 1 C. B. 858.

(*m*) *Lavery v. Turley* (1860), 6 H. & N. 239.

S. 4 (1). (3) would appear to be explainable according to the principle thus stated by Lord Selborne with reference to part performance in equity (n): "When the statute says that no action is to be brought . . . it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract." In such a case "the matter has advanced beyond the stage of contract, and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

against third persons.

With regard to the rights of the seller or the buyer against any third person, as a carrier, there is no reason to suppose that the changed wording of the Act has in any way affected the law applicable to such cases (o).

Unless the buyer shall accept part of the goods so sold.—"So sold," i. e., for the price of 10*l.* or upwards (p). "It is quite settled that the acceptance of goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one of fact for the jury, not matter of law for the Court" (q). The acceptance must be "clear and unequivocal; but it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do, amount to an acceptance" (r).

Acceptance.

Having regard to the definition of acceptance given in sub-s. 3, (which is distinct from the definition of acceptance in performance of the contract under s. 35,) any act of the buyer in relation to the goods will amount to an acceptance:—

(1.) If it be such as recognizes a pre-existing contract of sale; and

(2.) Whether or not such act amounts to a final acceptance.

Now an act which recognizes a pre-existing contract of sale appears to be defined, in *Page v. Morgan* (s) and *Kibble v. Gough* (t), as one "which could not have been done except upon admission that there was a contract, and that the goods were sent to fulfil that contract"; as "such a dealing with the

(n) In *Maddison v. Alderson* (1883), 8 Ap. Ca. at p. 476.

(o) See *Coombs v. Bristol, &c. Ry. Co.* (1858), 3 H. & N. 510. See also remarks of Parke, B., in *Wait v. Baker* (1848), 2 Ex. 1.

(p) Per Jervis, C.J., in *Tomkinson v. Staigh* (1856), 25 L. J. O. P. 85.

(q) Per Denman, C.J., in *Edan v. Dudfield* (1841), 1 Q. B. 302.

(r) Benj. pp. 137, 138.

(s) (1885), 15 Q. B. D. 228.

(t) (1878), 38 L. T. N. S. 204.

goods as amounts to a recognition of the contract" (u); "a dealing with the goods involving an admission that there was a contract" (x). And Brett, M. R., in the same case of *Page v. Morgan* (x), further shows, negatively, the extent of the operation of such an act in the following words:—"Suppose that, the goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out, or refuses to have anything to do with them. There would be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same." The above principles are here quoted somewhat in detail, as the subject is extremely obscure, and the cases, during a long course of years, such that it is difficult to educe a consistent rule from them. Prior to the year 1850, the rule was that an acceptance meant a final acceptance, such as afterwards precluded the buyer from objecting either to the quantum or quality of the goods (y). In that year it was first laid down (z) that, as a mere partial performance by the buyer, by part payment, or part acceptance and receipt, was sufficient, it must, at all events, be open to him, in the words of Mr. Benjamin (a), "to refuse to accept delivery of the bulk, not because there is not a valid contract proven, but because the seller fails to comply with the contract as proven." Accordingly, the principle was laid down that "acceptance" did not necessarily mean a final acceptance by the buyer in fulfilment of the contract. All that is necessary is, in the words of another learned judge (b), that "the defendant should have accepted in the quality of vendee; . . . the acceptance is to establish the broad fact of the relation of vendor and vendee." "Acceptance of the goods" in fact, according to the interpretation now prevailing, appears to approximate very closely in meaning to, if not to be synonymous with, "acceptance of the contract."

As, therefore, acceptance merely goes to show the existence of a contract of sale, "this effect is produced, although there may be a dispute between the parties as to the terms of the contract. Such dispute is to be determined on the parol evidence, as all

(u) Per Bowen, L.J., in *Page v. Morgan* (1885), 15 Q. B. D. at p. 233.

(x) Per Brett, M.R., in *Page v. Morgan*, *ibid.*, at p. 232.

(y) See e.g. *Hove v. Palmer* (1820), 3 B. & A. 321.

(z) In *Morton v. Tibbett* (1850), 15 Q. B. 428.

(a) p. 141.

(b) Per Williams, J., in *Tbmkinson v. Staigh* (1856), 25 L. J. C. P. at p. 89.

S. 4 (1). other questions of fact are, by the jury. Where the goods have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptances were to be given. This point may not only be inferred from . . . *Morton v. Tibbett*, but was expressly decided in *Tomkinson v. Staight*" (c).

It will thus be seen that the sole effect of an acceptance and actual receipt is to dispense with the necessity of a memorandum (d), and its effect, except as proof of the *existence* of the contract, is by no means co-extensive with that of a memorandum. In the latter, all the material terms of the contract must be embodied, otherwise it is not a memorandum "of the contract," and any parol evidence adduced to invalidate it, strikes at once at the enforceability of the contract. On the other hand, where the contract has been rendered enforceable by an acceptance and actual receipt, its special terms may still, it has been seen, be decided by the jury on parol evidence as in every case (e). "The legislature, in fact, has thought that where there is a fact so consistent with the alleged contract of sale as acceptance, it would be quite safe to dispense with the necessity of a writing. The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee" (f).

The general principle being then as above stated, what is "an act in relation to the goods which recognizes a pre-existing contract of sale"?

Acts amount-
ing thereto.

The buyer may, of course, examine and select the goods he intends to buy, or he may give the seller authority to select for him. In the former case an acceptance prior to actual receipt will be proved, as the buyer has finally agreed upon the specific articles; and the same act which shows that the property has passed at common law (and under s. 18, Rule 1, of the Act), also shows an acceptance under this section (g).

On the other hand, when the seller is to select the goods, his act in doing so is not an acceptance by the buyer through the seller as his agent (h). The buyer must further have an oppor-

(c) Benj. p. 158.

(d) Per Lord Campbell in *Morton v. Tibbett* (1850), 15 Q. B. 428.

(e) Per Crowder, J., in *Tomkinson v. Staight* (1856), 25 L. J. C. P. at p. 89.

(f) Per Williams, J., *ibid.*

(g) *Simmonds v. Humble* (1862), 13 C. B. N. S. 258; *Cusack v. Robinson* (1861), 1 B. & S. 299. And the

buyer may also mark the goods: *Bill v. Bament* (1841), 9 M. & W. 36.

(h) Per Holroyd, J., in *Howe v. Palmer* (1820), 3 B. & A. 321, ap-

tunity of examining his goods (*i*); but this he may waive, as, *e. g.*, by reselling before examination (*k*); or by an offer to the seller to take the goods back (*l*); or by any other act indicative of an intention to take to the goods as owner (*m*), as, *e. g.*, dealing with the bill of lading (*n*). S. 4 (1).

Furthermore, after a receipt of the goods, the buyer may do acts from which an intention of taking to them as owner may be inferred or presumed, as, *e. g.*, making an unreasonable delay in notifying his rejection (*o*); or dealing with them in an unreasonable manner (*p*). In connection with this latter point, Erle, J., makes the following pertinent remarks in *Parker v. Wallis* (*p*):—"I think it clear that if, after goods have arrived, the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them." And the law equally applies to the documents of title, which are the symbol of the goods (*q*).

Kibble v. Gough (*r*), and *Page v. Morgan* (*s*), however, show that, without any act of ownership, the act of examination of the goods, involving as it does an admission of the existence of the contract, is evidence to go to the jury of an acceptance by the buyer.

In *Taylor v. Smith* (*t*), however, the Court of Appeal declined to find acceptance in a case where the examination consisted of a cursory inspection without any dealing with the goods, followed by a prompt rejection; and the judges, in distinguishing *Kibble v. Gough*, and *Page v. Morgan*, expressed (*u*) some doubt whether the verdicts of the jury finding acceptance in those cases were justified by the facts.

It is, however, difficult to see how an examination of goods

proved in *Morton v. Tibbett*. But the buyer may afterwards expressly agree thereto: *Rohde v. Thwaites* (1827), 6 B. & C. 388.

(*i*) *Hunt v. Hecht* (1853), 8 Ex. 814.

(*k*) *Morton v. Tibbett* (1850), 15 Q. B. 428.

(*l*) *Castle v. Scurder* (1861), 6 H. & N. at p. 832.

(*m*) *Beaumont v. Brengeri* (1847), 5 C. B. 301.

(*n*) *Currie v. Anderson* (1860), 2 E. & E. 592.

(*o*) *Bushell v. Wheeler* (1844), 15 Q. B. 442.

(*p*) *Parker v. Wallis* (1855), 5 E. & B. 21. *Curtis v. Pugh* (1847), 10 Q. B. 111, is, *semble*, not law.

(*q*) *Currie v. Anderson*, *supra*; *Meredith v. Meigh* (1853), 2 E. & B. 364.

(*r*) (1878), 38 L. T. N. S. 204.

(*s*) (1885), 15 Q. B. D. 228.

(*t*) [1893] 2 Q. B. 65 (actually decided in 1892).

(*u*) Per Lord Herschell, at p. 71; per Lindley, L.J., at p. 73; and per Kay, L.J., at p. 75.

S. 4 (1). on two occasions, coupled with a statement that they were not "according to representation," and a rejection, was not an "act in relation to" the goods recognizing a contract of sale within this sub-section.

Quere, whether there would be an acceptance where the examination takes place under circumstances rebutting the presumption of such an admission, *e. g.*, where the buyer is insolvent and purposely abstains from accepting (*v*).

Where the buyer has not in any way dealt with the goods, nor in any way waived his right of examination, there is no acceptance by him (*w*). Bramwell, B., makes on this question the following remarks in *Castle v. Szwed* (*x*). After approving the rule laid down in *Morton v. Tibbett*, he says:—"I think, however, that it is a good general rule or test, that there must be such an acceptance and delivery as would give the party an opportunity, at all events, of judging whether they are what they profess, and of examining them in the sense in which an examination is needed. But you must ascertain in each particular case when the duty of examining arises, or when the duty of availing yourself of the opportunity arises. . . . At all events, the vendee must have had the opportunity, if he chose to avail himself of it, and that opportunity could only be properly said to occur when it was his duty, under the contract, either to object, or to actually receive." See also remarks to the same effect in other cases (*y*).

With regard to goods already in the buyer's possession, the same facts which show an actual receipt (*q. v.*) may also go to show an acceptance (*z*).

An acceptance may precede, be contemporaneous with, or subsequent to, an actual receipt (*a*). It must, however, take place with the consent of the seller. Accordingly, an acceptance subsequent to the seller's disaffirmance of the, as yet, unenforceable contract is unavailing (*b*).

Acceptance may also be of the sample, if the latter is also considered as part of the bulk (*c*). This is in accordance with

(*v*) *Nicholson v. Bower* (1858), 1 E. & E. 172; *Smith v. Hudson* (1865), 6 B. & S. 431.

(*w*) *Smith v. Hudson*, *supra*; *Howe v. Palmer* (1820), 3 B. & A. 321.

(*x*) (1860), 29 L. J. Ex. at p. 235.

(*y*) Per Cockburn, C.J., in *Smith v. Hudson*, *supra*; per cur. in *Coombs v. B. & E. Ry. Co.* (1858), 3 H. & N. 510; per Alderson, B., in *Norman v. Phillips* (1846), 14 M. & W. 277.

(*z*) *Lillywhite v. Devereux* (1848), 15 M. & W. 285; *Taylor v. Wakefield* (1856), 6 E. & B. 765.

(*a*) *Cusack v. Robinson* (1861), 1 B. & S. 299.

(*b*) *Taylor v. Wakefield*, *supra*; *Smith v. Hudson*, *supra*.

(*c*) *Hinde v. Whitehouse* (1806), 7 East, 558; *Gardner v. Groult* (1857), 2 C. B. N. S. 340.

the principle which also applies to earnest and signature [*q. v.*], both of which may be given or made *alio intuitu*. S. 4 (1).

A carrier is not an agent to accept goods (*d*). For his agency to receive, *v.* Actual receipt.

For acceptance under entire contracts, see *ante*, p. 27.

In the note (*e*), *infra*, will be found a number of cases on acceptance, with their salient facts, in chronological order.

ILLUSTRATIONS [Of Acceptance].

1. B. selects after inspection, and agrees to buy of A., six specific firkins of butter, and orders them to be sent to C., which is done. B. has accepted the butter at the time of sale. *Cusack v. Robinson* (1861), 1 B. & S. 299.

2. B. orders of A. a quantity of machinery deliverable at H. The goods are carried by C., a carrier appointed by B., to H., and there warehoused, and an advice note is sent to B. B. informs C. that he rejected the goods, but he does not communicate with A. for six months, when he refuses the machinery. There is evidence of an acceptance by B. by reason of his delay and silence. *Bushel v. Wheeler* (1844), 15 Q. B. 442 (*f*).

3. B. orders goods of A. to be shipped by a particular ship. A. ships them and sends B. the bill of lading, which B. keeps for a year without communication with A. The goods never arrive. B. then returns the

(*d*) *Hanson v. Armitage* (1822), 5 B. & A. 557; *Taylor v. Smith*, [1893] 2 Q. B. 65.

(*e*) *Chaplin v. Rogers* (1800), 1 East, 192 (resale of specific article); *Kent v. Huskisson* (1802), 3 B. & P. 233 (order for unspecified goods, prompt return after examination); *Blenkinsop v. Clayton* (1817), 7 Taunt. 597 (resale of horse bought); *Howe v. Palmer* (1820), 3 B. & A. 321 (order for unspecified goods, no examination); *Baldey v. Parker* (1823), 2 B. & C. 37 (entire contract, marking goods); *Coleman v. Gibson* (1832), 1 M. & R. 168 (lapse of reasonable time after receipt); *Maberley v. Sheppard* (1833), 10 Bing. 99 (dealing by buyer with unfinished chattel); *Williams v. Burgess* (1839), 10 A. & E. 499 (contract for sale and resale; once good, good for resale); *Saunders v. Topp* (1849), 4 Ex. 390 (express approval after receipt); *Hunt v. Hecht* (1853), 8 Ex. 814 (prompt rejection after examination, *quere* reconcilable with *Page v. Morgan*, *infra*); *Gardner v. Grout* (1857), 2 C. B. N. S. 340 (samples taken as bulk after sale); *Coombs v. B. & E. Ry. Co.* (1858), 3 H. & N. 510 (order for unspecified goods, lost before examination); *Kershaw v. Ogden* (1865), 3 H. & C. 717 (selection in specie and part removal by buyer); *Marshall v. Green* (1875), 1 C. P. D. 35 (heavy goods, acts of ownership, resale); *Kibble v. Gough* (1878), 38 L. T. N. S. 204 (sale by sample, examination and rejection, evidence of acceptance to go to the jury, principle of acceptance); *Rickard v. Moore* (1878), *ib.* 841 (following principle of *Kibble v. Gough*); *Page v. Morgan* (1885), 15 Q. B. D. 228 (following principle of *Kibble v. Gough*); *Taylor v. Smith*, [1893] 2 Q. B. 65 (inspection and rejection, no acceptance, *Kibble v. Gough* and *Page v. Morgan* distinguished. See remarks on p. 33, *supra*).

(*f*) Cf. with this case *Norman v. Phillips* (1845), 14 M. & W. 277; per *Blackburn, J.*, in *Smith v. Hudson* (1865), 6 B. & S. at p. 448.

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bill to A. asking him to see about the goods. B.'s retention of the bill of lading for a year is an acceptance of the goods, at any rate coupled with his request to A. to see after the goods, as in both cases he dealt with the goods as owner. *Currie v. Anderson* (1860), 2 E. & E. 592.

4. B. orders of A. a quantity of brushes and other goods, and on arrival at A.'s premises inspects them, and orders a mark on one of the packages to be changed. B. also writes in A.'s ledger "Received the above, B." The direction as to the marking and B.'s receipt are each evidence of acceptance by B. *Bill v. Bament* (1841), 9 M. & W. 37.

5. A. sells to B. some turnip seed. On delivery, B. spreads it out thin to dry it, contending that it was hot and mouldy, and that he did so by authority of A. B.'s act in spreading the seed may be an act of ownership or not, according as he spread out the seed as being owner thereof, or as he did so for A.'s benefit or by his authority. *Parker v. Wallis* (1855), 5 E. & B. 21.

6. B. agrees to buy of A. fifty quarters of wheat according to sample, and sends C., his carrier, therefor. Before arrival B. re-sells the wheat to D. On receipt of the wheat D. rejects it as not according to sample. B. by his re-sale has accepted the wheat, but may contend that it is not according to sample. *Morton v. Tibbett* (1850), 15 Q. B. 428.

7. A. delivers to B. a piano which B. had selected on A.'s premises and demands payment therefor. B. contends that the piano was not sold for ready money, but delivered as security for some bills of exchange on which A. was liable to B. There is an acceptance by B. of the piano, but he may afterwards contend that it was delivered only as security, and that in the meantime he had credit. *Tomkinson v. Staight* (1856), 17 C. B. 698.

8. B. agrees to buy of A. eighty-eight quarters of wheat according to sample. A. delivers the wheat at B.'s mill, when B.'s foreman lands and examines twenty-four sacks, and B. afterwards opens and examines twelve sacks more. B. then rejects the whole as inferior to sample. There is evidence of B.'s acceptance of the wheat, as B.'s examination of the goods by the sample was evidence of an admission that the goods were delivered under a contract of sale, but B. may afterwards reject them if they were inferior to sample. *Page v. Morgan* (1885), 15 Q. B. D. 228 (g).

9. A. agrees to sell B. forty-eight quarters of barley, and delivers at a railway station to be forwarded to B. B. then becomes bankrupt, and A. countermands the delivery. The goods remain at the station, and are not inspected or dealt with by B. B. has not accepted prior to his bankruptcy, nor can his trustee do so, as A. has withdrawn his consent. *Smith v. Hudson* (1865), 6 B. & S. 431.

And actually receive the same.—The Act, it will be seen, gives no definition of actual receipt, though it does of acceptance.

Actual receipt may be said *generally* to take place when there is a delivery of the goods, or of the documents of title thereto, to or into the control of the buyer, so as to divest the seller's lien in respect thereof (h).

(g) *Qu.* whether this case is reconcilable with *Hunt v. Hecht* (1853), 8 Ex. 814.

(h) See per cur. in *Cusack v. Robinson* (1861), 1 B. & S. 299, and *Benj.*

p. 169, quoted *infra*. See, however, on the question of lien, the exception mentioned on p. 40, and in the notes to s. 41 (2).

In particular, actual receipt will be established under the following principles, according to the situation of the goods at the time of the contract.

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Actual receipt ["and actually receive the same."]"—"The goods sold may be in the possession—

- (1.) Of the buyer as bailee or agent of the seller :
- (2.) Of a third person, whether or not bailee or agent of the seller :
- (3.) Of the seller himself, and this is the most usual case" (i).

Firstly, when the goods are already in the buyer's possession:—

"Whenever it can be shown that the buyer has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proved by parol, and it is a question of fact for the jury whether the acts were done because the buyer had taken to the goods as owner. The principle is illustrated in the case of *Edan v. Dudfield*" (k).

Another way of treating the above facts is to consider that the actual receipt had already taken place, the goods being already in the buyer's possession, and that the facts proved showed an *acceptance* (see *supra*) ; or that the same facts proved at the same time both an acceptance and actual receipt. The latter view appears to have been taken by the Court in *Lillywhite v. Devereux* (l).

ILLUSTRATIONS.

1. B., A.'s tenant of a furnished house, agrees to buy of A. the furniture if C., the superior landlord, would accept B. as tenant. The goods are valued, but C. does not give his consent, and B. continues his former possession. There is no actual receipt by B. *Lillywhite v. Devereux* (1846), 15 M. & W. 285.

2. B., being in possession of A.'s goods as agent for sale, agrees to buy them at the invoice price, less 15l. per cent., and afterwards sells them for 120l., and renders A. an account giving A. credit for the 120l. There is evidence of an actual receipt by B. *Edan v. Dudfield* (1841), 1 Q. B. 302.

Secondly, where the goods are in possession of a third person:—

- (1.) *As Bailees for the Seller.*

"An actual receipt takes place when the seller, the buyer, and the third person agree together that the latter shall cease to hold the goods for the seller, and shall hold them for the buyer. They were in possession of an agent for the seller, and, therefore, in contemplation of law, in possession of the seller himself, and they become in the possession of an agent for the buyer, and,

(i) Benj. p. 159.

p. 160.

(k) (1841), 1 Q. B. 302; Benj.

(l) (1846), 15 M. & W. 285.

S. 4 (1). therefore, in that of the buyer himself. But it is important to remark that all of the parties must join in this agreement, for the agent of the seller cannot be converted into an agent for the buyer without his knowledge and consent. Therefore, if the seller have goods in the possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods, or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed he remains agent and bailee of the seller" (m).

ILLUSTRATION.

A. sells goods to B. and warehouses them with C., who gives A. a delivery warrant, which A. indorses to B. B. keeps it ten months without presenting it to C. There is no actual receipt by B., as C. never attorned to him. *Farina v. Home* (1846), 16 M. & W. 119 (n).

(2.) *Not as Bailee for the Seller.*

"In such cases the delivery may be effected by the seller's putting the goods at the disposal of the buyer, and suffering the latter to take actual control of them, as in the cases of *Tansley v. Turner* (o) and *Cooper v. Bill*" (p).

With regard to cases falling under this heading, it is submitted that the true *ratio decidendi* of *Marshall v. Green* (q) was that the land, on which grew the timber which was sold, was in the possession, not of the seller, but of the seller's tenant. There the buyer had cut some of the trees, and had agreed, before the seller's countermand of the sale, to sell the tops and stumps to a third person, and it was held that there had been an actual receipt. Grove, J., was the only judge who relied upon the distinction; both Coleridge, C.J., and Brett, J., treated the case as if the land were the seller's. It is submitted that Grove's, J., view, that actual receipt is easier to prove where the land is not the seller's, is sound.

ILLUSTRATION.

A. sells to B. timber then standing on the land of A.'s tenant, C. B. cuts down some of the trees, and agrees to sell to D. the tops and

(m) Benj. p. 161. See also per Crompton, J., in *Castle v. Swoorder* (1861), 30 L. J. Ex. 310. On the question of attornment, see notes to ss. 29 (3) and 43 (1) (b).

(n) Cf. *Godts v. Rose* (1855), 17 C. B. 229, where the tripartite agree-

ment was not complete. This case was, however, not one under s. 4.

(o) (1835), 2 B. N. C. 151.

(p) (1865), 3 H. & C. 722; Benj. p. 163.

(q) (1875), 1 C. P. D. 35.

stumps. There is an actual receipt by B., as A. has put the timber at B.'s disposal, and allowed him to deal with it. *Marshall v. Green* (1875), 1 C. P. D. 35.

S. 4 (1).

Thirdly, where the goods are in the seller's possession.

"Of course if the buyer remove the goods from the seller's possession and take them into his own, there is an actual receipt; . . . and . . . the actual removal of a part, however small, of the things sold, if taken as part of the bulk, and by virtue of his purchase (r), is an actual receipt sufficient to make the contract [enforceable], although a serious question may and often does arise at a later period, whether there has been an actual receipt of the bulk.

"It is well settled that the delivery of goods to a common carrier, *d fortiori*, to one specially designated by the buyer, for conveyance to him, or to a place designated by him, constitutes an actual receipt by the buyer. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter, in employing the carrier, being considered as an agent of the former for that purpose (s). It must not be forgotten that the carrier only represents the buyer for the purpose of receiving, not accepting, the goods (t).

"It is also now finally determined that the goods may remain in the possession of the seller if he assume a changed (u) character and yet be actually received by the buyer. It may be agreed that the seller shall cease to hold as owner, and shall assume the character of bailee or agent of the buyer, thus converting the possession of the seller into that of the buyer through his agent" (v).

"In many of the cases the test for determining whether there has been an actual receipt by the buyer has been to inquire whether the seller has lost his lien. Receipt implies delivery (x), and it is plain that so long as the seller has not delivered, there can be no actual receipt by the buyer. The subject is placed in a very clear light by Holroyd, J., in *Baldey v. Parker* (y). 'Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute

(r) *Klinitz v. Surrey* (1805), 5 Esp. 266; *Paley on Agency*, p. 171.

(s) *Dawes v. Peck* (1799), 8 T. R. 330; *Wait v. Baker* (1848), 2 Ex. 1; *Dunlop v. Lambert* (1839), 6 C. & F. 600.

(t) *Hanson v. Armitage* (1822), 5 B. & A. 557.

(u) Mere continuance of previous possession, though according to general custom, is insufficient: *In re Roberts* (1887), 36 Ch. D. 196.

(v) *Benj.* pp. 164, 165.

(x) *Per Parke, B., in Saunders v. Topp* (1849), 4 Ex. at p. 394.

(y) (1823), 2 B. & C. 37.

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contemplates such a parting with the possession, and, therefore, so long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.' No exception is known in the whole series of decisions to the propositions here enunciated" (z). There is, however, one important exception, in the case where the seller becomes bailee for the buyer; this is sufficient to constitute an "actual receipt" of the goods by the buyer under this section, but does not divest the seller's lien. See s. 41 (2), and notes.

ILLUSTRATIONS.

1. A. sells B. a horse, and after the bargain begs the loan of it, which B. agrees to. The horse remains throughout in A.'s possession. A. has become B.'s bailee of the horse, and there is an actual receipt by B. *Marvin v. Wallis* (1856), 6 E. & B. 726.

2. A. sells B. a horse, and after the sale B. requests A. to keep the horse at livery, which A. agrees to do, and removes the animal into another stable. There is an actual receipt by B. (apart from the removal of the horse) by A.'s agreeing to change his possession into that of livery stable keeper. *Elmore v. Stone* (1809), 1 Taunt. 458 (a).

3. A. sells B. a horse, no time being specified for payment, but the horse to remain twenty days with A. At the end of that time A., by B.'s direction, sends the animal to Kempton Park, and enters him in his own name at B.'s request. There is no actual receipt by B., as A. all along kept possession of the horse. *Carter v. Toussaint* (1822), 5 B. & A. 855 (b).

4. A. sells to B. on six months' credit, two puncheons of rum then in a bonded cellar, and sends B. an invoice describing the puncheons in a letter in which he says that the rum remained in bond, and would be free of warehouse charges for six months. After the six months, B. requests that the goods should remain a further time in bond, and that A. should sell them for him. There is evidence that the parties agreed that the rum should remain with A. as warehouseman, and of actual receipt by B. *Castle v. Swoorder* (1861), 6 H. & N. 828 (c).

5. A. sells to B. a stack of hay on A.'s premises at six months' credit. At the end of the time the hay remains on A.'s premises. There is a custom that the hay should remain till it suited the buyer to remove it. There is no actual receipt by B., as A. never agreed to become B.'s bailee. *Evans v. Roberts* (1887), 36 Ch. D. 196.

Or give something in earnest to bind the contract, or in part payment.—"The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring or other object, to be repaid or redelivered on the com-

(z) Benj. p. 169. Mr. Benjamin also refers to (*inter alia*) *Holmes v. Hoskins*, 9 Ex. 753; *Cusack v. Robinson* (1861), 1 B. & S. 299; *Castle v. Swoorder* (1860), 6 H. & N. 828; *Morton v. Tibbett* (1850), 15 Q. B. 428.

(a) See also *Beaumont v. Brengeri* (1847), 5 C. B. 301.

(b) See also *Tempest v. Fitzgerald* (1820), 3 B. & A. 680.

(c) Cf. *Grice v. Richardson* (1877), 3 Ap. Ca. 319, as to the effect of similar circumstances upon seller's lien.

pletion of the contract, appears to be one of great antiquity and very general prevalence. . . . It was familiar to the law of Rome . . . and it will be enough to observe that the general rule appears to have been that expressed in the Institutes, III. 24: '*Is qui recusat adimplere contractum siquidem est emptor, perdit quod dedit; si vero venditor, duplum restituere compellitur, licet super arrhis nihil expressum est.*' Furthermore, the earnest did not lose that character because the same thing might also avail as part payment. . . . That earnest and part payment are two distinct things is apparent from the 17th section of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract" (d).

S. 4 (1).

Earnest.

"The language clearly intimates that the earnest is 'something' that 'binds the bargain,' whereas it is manifest that there can be no part payment till after the bargain has been bound or closed. . . . The giving of earnest, and the part payment of the price, are two facts independent of the bargain, capable of proof by parol, and the framers of the statute have said, in effect, that either of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard . . . to render the contract good [i.e., enforceable by action] without writing" (e).

As the buyer is to "give something," it follows that, both in the case of part payment and of earnest, something must be actually *retained* by the seller. Thus, "striking the bargain" by drawing a coin over the seller's hand is insufficient (f).

With respect to part payment, it appears to follow from the only case (g) applicable to this part of the Act that part payment must take place by means of some *separate* act, or agreement, collateral to (i.e., not merely being a term of) the main contract. As Alderson, B., says:—"To bind the buyer . . . he must have done *two* things: first, made a contract; and next . . . given something as earnest or as part payment." Consequently, a *set-off forming a term of the original contract* does not constitute a part payment; *secus*, if by virtue of a *subsequent* or *independent* agreement.

Part payment.

The giving of earnest or part payment has the same effect as acceptance (h), i.e., the buyer may still dispute the actual terms of the contract. "As part payment, however minute the sum

(d) Per Fry, L.J., in *Howe v. Smith* (1884), 27 Ch. D. 100, 101.

(e) Benj. pp. 172, 173.

(f) *Blenkinsop v. Clayton* (1817), 7 Taunt. 597.

(g) *Walker v. Nussey* (1847), 16 M. & W. 302; cf. in *Am. Archer v. Zeh*, 5 Hill, 200; and per cur. in *Edgerton v. Hodge*, 41 Verm. 676.

(h) *Tomkinson v. Staigh* (1856), 25 L. J. C. P. 85.

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may be, is sufficient, so part delivery, however minute the portion may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract"(i).

For the various ways in which payment may be made, see Benj., p. 175, and Book IV., Part III., Chap. II.

ILLUSTRATION [Part Payment].

A., being indebted to B. in 4*l.*, sells B. goods of the value of 20*l.* on the terms that B. should only pay 16*l.* This is no payment by B. of 4*l.*, the transaction not being collateral to the contract. *Walker v. Nussey* (1847), 16 M. & W. 302.

Or unless some note or memorandum in writing of the contract.—"At common law, parties entering into any contract may either reduce its terms to writing, or may refer to some other writing already in existence, as containing the terms of their agreement, and when they do so they are bound by what is written, whether signed by them or not. . . . If, by the agreement, the whole contract is reduced to writing, or by mutual consent is to be taken as embraced in a pre-existing writing, neither party is allowed to offer proof that any additional terms were agreed to [subject, however, to the incorporation by implication under s. 55 of trade usages, obligations implied by law, &c.]. . . But the common law does not prohibit parties from making contracts of which only part is in writing. . . . When either a part or the whole of an agreement is thus made in writing, or by reference to a writing, the agreement, in general, cannot be proven by any other means than by adducing the writing itself in proof, so that, independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. But this result only takes place when the writing is, by the consent of both parties, agreed to be that which settles or contains their contract in whole or in part. . . . The Statute of Frauds leaves all this law quite as it was before. If the contract be in writing in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment, or of part acceptance, and receipt to establish the validity of the contract. The writing in such a case is as indispensable in contracts for the sale of goods of less value than 10*l.* as in those above that limit, and is as conclusive in settling

(i) Per Lord Campbell in *Morton v. Tibbett* (1850), 15 Q. B. 428.

the terms of the bargain as if the Statute of Frauds had never been passed. . . . It must be steadily borne in mind that the statute was not enacted for cases where the parties . . . have signed a written contract; for in those cases the common law affords by its rules quite a sufficient guarantee against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, or unless his signature to *some* written note or memorandum of the bargain—not the bargain itself—could be shown. The existence of the note or memorandum pre-supposes an antecedent contract by *parol*, of which the writing is a note or memorandum” (*j*).

S. 4 (1).

Lindley, L.J., makes on this point the following remarks (*k*):—

“The object of the statute being merely to exclude *parol* evidence, any writing embodying the terms of the agreement, and signed by the party to be charged, is sufficient. That view was taken in *Barkworth v. Young* (*l*), and the idea of agreement need not be present to the mind of the person signing. An affidavit made with quite a different object was in that case held to be a sufficient note or memorandum; and so have various other documents.” And Smith, L.J., also says (*m*):—“A letter to a third party has been held enough. . . And I should say that an entry in a man’s own diary, if it were signed by him and the contents were sufficient, would do. The question is not what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum of the promise signed by the person to be charged?” (*m*).

Some note or memorandum of the contract being then necessary, we proceed to inquire (1) what may be such a memorandum: (2) what is a *sufficient* memorandum.

Firstly, with regard to the *character* of the memorandum, “the statute does not require that the whole of the terms of the contract should be agreed to at one time, nor that they should be written down at one time, nor on one piece of paper; accordingly, it is settled that when the memorandum of the bargain between the parties is contained in separate pieces of paper, and when these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the statutes, provided the contents of the signed paper make such reference to the other written paper or papers, as to enable the Court to construe the

Character of
the memo-
randum.

(*j*) Benj. pp. 180—183.

(*l*) (1856), 4 Drew. 1.

(*k*) In *In re Hoyle*, [1893] 1 Ch. at

(*m*) [1893] 1 Ch. at p. 100.

S. 4 (1).

whole of them together as constituting all the terms of the bargain. And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of signature*” (n).

The necessity that the signed paper should make reference to the unsigned does not mean that the former should *itself identify* the latter. “If it appears from the instrument itself that another document is referred to, that document may be *identified by parol* evidence. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity” (o). But the *reference itself* cannot be supplied by parol (p).

Bramwell, L.J., gives, in *Long v. Millar* (o), a good illustration which has been subsequently quoted with approval (q): “Suppose that A. writes to B., saying that he will give 1,000*l.* for B.’s estate, and at the same time states the terms in detail; and suppose that B. simply writes back in return, ‘I accept your offer.’ In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A. without infringing s. 4 of the Statute of Frauds, which requires a note or memorandum in writing.”

But, though the necessary memorandum may consist of several writings mutually incorporated by internal evidence, yet “these separate papers must be consistent, and not contradictory in their statement of the terms, for otherwise it would be impossible to determine what the bargain was without the introduction of parol testimony to show which of the papers stated it correctly” (r). Cases on this point are referred to in the note (s).

Sufficiency of
the memo-
randum.

Secondly, with regard to the *sufficiency* of the memorandum, i.e., a memorandum “of the contract.”

As all that is required is *evidence of the terms* of the contract, and not the written contract itself, or evidence of the fact of agreement, even a writing repudiating the contract is, if it contains the terms thereof, sufficient. Such a case must, however, be carefully distinguished from those mentioned in the note (s), where the effect of the repudiation is to leave the terms of the contract in doubt.

(n) Benj. p. 192.

(o) Per Thesiger, L.J., in *Long v. Millar* (1879), 4 C. P. D. 450.

(p) *Keworth v. Schofield* (1824), 2 B. & C. 945; *Rishton v. Whatmore* (1878), 8 Ch. D. 467; *Taylor v. Smith*, [1892] 2 Q. B. 65; 61 L. J. Q. B. 331.

(q) In *Oliver v. Hunting* (1890),

59 L. J. Ch. 258.

(r) Benj. p. 194.

(s) *Cooper v. Smith* (1812), 15 East, 103; *Jackson v. Lowe* (1822), 1 Bing. 9; *Smith v. Surman* (1829), 9 B. & C. 561. *Richards v. Porter* (1827), 6 B. & C. 437, seems irreconcilable with the other cases.

In the same way, "a note or memorandum of the bargain is sufficient, although it contains a mere proposal, if supplemented by parol proof of acceptance" (t). In other words, the fact of agreement need not appear in the memorandum.

The effect of the decided cases may be shortly stated as follows:—The note or memorandum must contain in express terms or by necessary implication—

- (1.) The names, or a sufficient description, of the seller and buyer in their respective characters as such (u):
- (2.) The goods sold:
- (3.) The price (x), if any were agreed upon (y):
- (4.) All other *material* terms of the contract (z).

With regard to (1), it is apparent to common sense that no memorandum can be a memorandum "of the contract" which does not state who are the contracting parties. As to the name of the party to be charged, that obviously must appear, as he has to sign; "and the name, or a sufficient description of the other party, is indispensable, because without it no contract is shown" (a). Further, no contract of sale from one particular party to the other is shown, unless the writing shows *who is the seller* and *who is the buyer* (b). But on this point parol evidence is admissible to show the business of either party so as to create the necessary inference from the facts of the case (c).

"But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of by name. . . . If the writing shows by description with whom the bargain is made, then the statute is satisfied, and parol evidence is admissible to *apply the description*" (d). This is only another instance of the legal principle (referred to by Thesiger, L.J., in *Long v. Millar* (e), as to latent ambiguity. "In point of fact . . . the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*. If I enter into a contract on behalf of my client . . . my principal . . .

(t) Benj. p. 229, quoting *Reuss v. Pickley* (1866), L. R. 1 Ex. 342.

(u) *Champion v. Plummer* (1805), 3 B. & P. 252.

(x) *Goodman v. Griffiths* (1857), 1 H. & N. 574; *Elmore v. Kingscote* (1826), 5 B. & C. 583.

(y) *Hoadley v. M'Laine* (1834), 10 Bing. 482.

(z) *M'Lean v. Nicholl* (1861), 7 Jur. N. S. 999; *Sarl v. Bourdillon* (1856), 26 L. J. C. P. 78.

(a) Benj. p. 202.

(b) *Vandenburgh v. Spooner* (1866), L. R. 1 Ex. 316.

(c) *Newell v. Radford* (1867), L. R. 3 C. P. 52.

(d) Benj. pp. 204, 205.

(e) (1879), 4 C. P. D. 450.

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my friend, in all these three cases there is no such statement. . . . But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house, No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty" (f). "The parties to a contract in writing must, no doubt, be specified, but it is not necessary that they should be specified by name. . . . If they are so indicated, by description or by reference, as to be ascertained, or certainly ascertainable, the exigency of the statute in that respect is satisfied" (g).

As regards (2), it is obvious that no memorandum "of the contract" can be sufficient which does not show what are the goods sold.

With respect to (3), "the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. (See s. 8(2), *post*, p. 62.) But the law only does this in the absence of an agreement; and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing . . . ; and finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price" (h).

Under (4) fall all the other material terms of the contract. Some cases where the memorandum was insufficient on this ground are quoted in the note (i). It may be here noticed that the Act, by the substitution of the word "contract" for "bargain," has apparently done away with the distinction taken in *Egerton v. Matthews* (k), and other cases (l), between the requirements of s. 17 as compared with s. 4 of the Statute of Frauds with regard to the statement of the *consideration*, the word in the latter section being "agreement," and requiring such a statement (m).

(f) Per Lord Cairns in *Rossiter v. Miller* (1878), 3 Ap. Ca. 1140, 1141.

(g) Per Lord O'Hagan, *ibid.* at p. 1147.

(h) Benj. pp. 225, 226; *Goodman v. Griffiths* (1857), 1 H. & N. 574.

(i) *M'Lean v. Nicholl* (1861), 7 Jur. N. S. 999; *Pitts v. Beckett* (1845), 13 M. & W. 743; *Archer v. Baynes* (1850), 5 Ex. 625; *Sarl v.*

Bourdillon (1856), 26 L. J. C. P. 78.

(k) (1805), 6 East, 307.

(l) *Marshall v. Lynn* (1840), 6 M. & W. 109; *Gibson v. Holland* (1865), 1 C. P. 1, per Willes, J.; *M'Cauley v. Strauss* (1883), Cab. & Ell. 106, per Stephen, J.

(m) *Wain v. Warlters* (1804), 2 Sm. L. C. (9th ed.) 266.

Some cases as to the sufficiency of a memorandum with regard to material terms are set out in the note (n). S. 4 (1).

As the memorandum required must be one "of the contract," *i. e.*, the contract sought to be enforced, it follows that where the contract sued upon is not the original but a substituted contract, the latter is unenforceable unless the evidence of it is also in writing. Contrary to the rule at common law (o), in cases within this section of the Act "no verbal agreement to abandon [the original contract] in part, or to add to, or omit, or modify, any of its terms, is admissible" (p). But parol evidence is admissible to prove the defendant's assent to a substituted *and completed mode of performance* of the original contract (q); and in this connection also a distinction is drawn between a substituted contract and a substituted time of performance, *voluntarily* assented to by one party at the request of the other. In the latter case, as the voluntary forbearance of the one party does not amount to a new contract, no fresh memorandum is required.

"A distinction has been pointed out and recognized between an alteration of the original contract . . . and an arrangement as to the mode of performing it. . . . The question is, what is the test . . . whether the case is within the one rule or the other? Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so, made by the vendee *before the expiration of the agreed time*, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages. . . . But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period of delivery, so that the vendor would be obliged, if he sued for the non-acceptance of an offer, to deliver after the agreed period, to rely upon the assent of the vendee to his request he *could not aver* and prove that he was ready and willing to deliver *according to the terms of the original contract*. The statement shows that he was not. He would be driven to rely upon the assent of the vendee to . . . an altered contract, or a new contract" (r).

The principles above stated with reference to a seller-plaintiff,

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| <p>(n) <i>M'Lean v. Nicholl</i> (1861), 7 Jur. N. S. 999; <i>Pitts v. Beckett</i> (1845), 13 M. & W. 743; <i>Archer v. Baynes</i> (1850), 5 Ex. 625; <i>Goodman v. Griffiths</i> (1857), 1 H. & N. 574.</p> | <p>(1833), 5 B. & Ad. at p. 65.
(p) <i>Benj.</i> p. 188.
(q) <i>Leather Cloth Co. v. Hieronimus</i> (1875), L. R. 10 Q. B. 140.
(r) <i>Per Cur. in Plevins v. Downing</i> (1876), 1 C. P. D. at pp. 225, 226.</p> |
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S. 4 (1). equally apply to the case of a buyer-plaintiff (*s*); and the rule may be thus concisely stated:—

When the plaintiff forbears delivery or receipt at the request of the defendant, made before the expiration of the agreed time for performance, he may rely upon the original contract. But when the defendant forbears delivery or receipt at the plaintiff's request (even though made *within* the time, and, *a fortiori*, when made *afterwards*), or when the defendant's request is made *after* the agreed time, the plaintiff is driven to rely upon a substituted contract (*t*).

Though the above is the law with regard to the proof of contracts *varying* the written contract, there is authority for the proposition that a written contract within this section of the Act may be *wholly rescinded* by parol. Such is the rule of equity (*u*), and, it is submitted, that under the Judicature Acts such would also be the rule in all Courts.

Parol evidence.

It will be seen from the foregoing remarks that parol evidence is admissible in some cases. The law may be summed up as follows. Parol evidence is admissible:—

- (1.) To explain a latent ambiguity (*x*):
- (2.) To show when (*y*), or at what stage (*z*), a writing became the memorandum:
- (3.) To show that the writing is not a memorandum of a (*a*), or of the whole of the (*b*), contract:
- (4.) To show the situation of the parties (*c*):
- (5.) To show a collateral fact, *e. g.*, that the memorandum was to take effect on a contingency (*d*):
- (6.) To show assent to a substituted and completed mode of performance (*e*), or a substituted mode of performance not amounting to a new contract (*f*):
- (7.) To charge the principal instead of the agent (*g*).

(*s*) *Ogle v. Vane* (1868), L. R. 3 Q. B. 272. 9 C. P. 311.

(*t*) See cases above quoted, and *Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Tyers v. Rosedale Iron Co.* (1875), L. R. 10 Ex. 195. (*a*) *Pym v. Campbell* (1856), 6 E. & B. 370; *Hussey v. Horne-Payne* (1879), 4 Ap. Ca. 311.

(*u*) See Fry on Sp. Perf. (2nd ed.) p. 445. It is noticeable that s. 61 (2) contains no saving of the rules of equity. (*b*) *Elmore v. Kingscote* (1826), 5 B. & C. 583.

(*x*) *Long v. Millar* (1879), 4 C. P. D. 450. (*c*) *Newell v. Radford* (1867), L. R. 3 C. P. 52.

(*y*) *Reuss v. Pickaley* (1866), L. R. 1 Ex. 342. (*d*) *Pym v. Campbell*, *supra*.

(*z*) *Stewart v. Eddowes* (1874), L. R. 10 C. P. 598. (*e*) *Leather Cloth Co. v. Hieronimus* (1875), L. R. 10 Q. B. 140.

(*a*) *Pym v. Campbell*, *supra*. (*f*) *Hickman v. Haynes* (1875), L. R. 10 C. P. 598.

(*b*) *Elmore v. Kingscote* (1826), 5 B. & C. 583. (*g*) *Trueman v. Loder* (1840), 11 A. & E. 589.

ILLUSTRATIONS [of the Memorandum].

S. 4 (1).

1. A. agrees to sell to B. 1,060 spruce deals, deliverable by a carrier, C. C. sends B. an advice note stating the number of the deals, and A. to be consignor. A. sends B. an invoice in the following terms:—"B. bought of A. 1,060 spruce deals. Free to flat, 100l. 11s. 4d. Per C.'s flat Arthur." B. writes across the advice note, "Refused; not according to representation; B.," and also writes a letter to A., "With reference to the deals refused by me, now lying at C.'s, they are not according to representation." The advice note, the indorsement, and the letter together do not form a memorandum, as they do not include the price of the goods, and cannot be incorporated with the invoice, as there is no internal reference thereto. *Taylor v. Smith*, [1893] 2 Q. B. 65.

2. A. sells a particular bay mare to B. through C., B.'s agent. C. writes to B. stating he had bought "the bay mare" for forty guineas, and follows it up by other letters reiterating the terms of the sale, and requesting payment. B. then writes to C. alluding to the mare which C. bought for him, and promising payment. B.'s letter (though sent to his own agent) is, coupled with C.'s letters, a sufficient memorandum of the sale as against B. *Gibson v. Holland* (1865), L. R. 1 C. P. 1.

3. B. is a baker, and A. a flour dealer. A. agrees to sell to B. some flour, and makes out this memorandum in B.'s book:—"Mr. B., 32 sacks cullasses at 39s., 280 lbs., to wait orders." This memorandum is sufficient, as the names of the parties appear as seller and buyer, parol evidence being admissible to show the surrounding circumstances, viz., that A. was a flour dealer and B. a baker. *Newell v. Rudford* (1867), L. R. 3 C. P. 52 (h).

4. A. agrees to sell to B. two chamber candlesticks complete, at 44s., and to fit them with a gallery to carry a shade. Afterwards, on being asked for a reference, B. says he intends to pay by C.'s cheque. B. writes his name in A.'s order book, which contains a description of the goods, and has A.'s name on the flyleaf. This is a good memorandum of the sale as against B., though (a) it contains no reference to the alteration in the candlesticks, nor (b) to the mode of payment; as (a) the agreement as to the gallery may be proved by parol to explain the word "complete;" (b) the mode of payment was not a specific part of the contract. *Sarl v. Bourdillon* (1856), 26 L. J. C. P. 78.

5. A., on January 11th, agrees to sell B. a parcel of wool, and B. gives A. a memorandum of the terms, stating "the whole to be cleared in about twenty-one days." A. afterwards writes to B. saying, "it is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days." A. afterwards writes again, "I beg to enclose copy of your letter of 11th January," which he encloses. A.'s last letter and its enclosure, together with A.'s first letter, are a good memorandum, and [probably] also A.'s first letter and B.'s memorandum. *Buxton v. Rust* (1872), L. R. 7 Ex. 279.

6. B. orders of A. two chimney glasses, the glass to be plate glass of the best quality, and on delivery A. sends B. an invoice, "B. bought of A. two chimney glasses gilt," and mentioning the price. B. replies by letter: "You advise having forwarded a printed list, patterns, and prices." These two documents are insufficient as a memorandum, as the term as to the quality of the glasses does not appear. *McLean v. Nicoll* (1861), 7 Jur. N. S. 999.

7. A. agrees to sell flour to B. The bargain is entered in A.'s order book, and the goods are delivered. B. then writes that he rejected the

(A) Cf. *Vandenburgh v. Spooner* identity of the seller did not appear. (1866), L. R. 1 Ex. 316, where the

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flour as it had not been sent in a week as agreed. There was no term as to time of delivery in the contract. B.'s letter and A.'s book do not form a good memorandum, as they falsify the contract insisted on by A. *Cooper v. Smith* (1812), 15 East, 103 (i).

8. B. buys of A. some chimney glasses for 38*l.* 10*s.* 6*d.*, deliverable at C.; on delivery, the glasses being cracked, B. writes: "In reply to your letter of the 1st inst., I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have for reasons made known to you at the time, &c." This is a good memorandum, as it contains all the terms, though it also repudiates the bargain. *Bailey v. Sweeting* (1861), 30 L. J. C. P. 150.

9. A. agrees to sell to B. 100 tons of pig iron by monthly deliveries of twenty-five tons in March to June. Three instalments are duly delivered. In June B. requests A. to postpone the delivery of the remaining twenty-five tons. After June A. tenders the twenty-five tons. A. may recover on the original contract, and may prove by parol B.'s request, as A. merely voluntarily forbore to press B., and no memorandum of the mere postponement is necessary. *Hickman v. Haynes* (1875), L. R. 10 C. P. 598 (k).

Be made and signed by the party to be charged.—"It is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed" (l). The word "party," therefore, has been substituted for the word "parties" in the 17th section of the Statute of Frauds.

Signature.

The effect of the cases on the subject of signature may be summed up as follows:—Neither subscription (m) nor handwriting (n) is necessary. All that is necessary is that the name of the party to be charged (o), or of his agent (p), or some sign, stamp, or mark intended to represent it (q), should appear upon the memorandum in such a position, in relation to its various parts, as to govern the whole of the instrument, and be placed there with the intention of recognizing it as having such effect (m). "When the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the

(i) Followed in *Richards v. Porter* (1827), 6 B. & C. 437.

(k) See the cases in Benj. pp. 189, 190, 692—696.

(l) Benj. p. 231.

(m) Per Lord Westbury in *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Evans v. Hoare*, [1892] 1 Q. B. 593.

(n) *Schneider v. Norris* (1814), 2 M. & S. 286.

(o) *Evans v. Hoare*, *supra*.

(p) *White v. Procter* (1812), 4 Taunt. 209.

(q) *Bennett v. Brumfit* (1867), L. R. 3 C. P. 28.

recognition of the contract (*r*). And such recognition of the signature may take place by subsequent oral acknowledgment (*s*). S. 4 (1).

It is submitted that, as the memorandum required by this section is not necessarily the contract itself, but only evidence of it, a signature, if otherwise sufficient, is not invalidated as such by the fact that it is affixed *alio intuitu*, and that the reasoning of the Court in *Jones v. Victoria Graving Dock Co.* (*t*) is sound. In the case of a sample, "though it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not, therefore, prevent its operating to another consistent intent also in pursuance of the purposes of the parties . . . namely, as a part delivery of the thing itself" (*u*); and so in the same way an earnest may also be a part payment. The same principle would, it is apprehended, apply to the other requirement of this section, viz., the signature to the memorandum. "The question is not *with what intent* the document is signed, but whether it is *de facto* drafted and signed by the party to be charged" (*x*). But see *Eley v. Positive Assurance Co.* (*y*).

Signature
affixed *alio
intuitu*.

ILLUSTRATIONS [of the Signature].

1. A. sends B. a bill of parcels thus: "B. bought of A. cotton yarns and piece goods, &c." All the bill except B.'s name is printed, and B.'s name was filled in in writing by A. A., by writing B.'s name, has appropriated his own printed name to the contract as a signature. *Schneider v. Norris* (1814), 2 M. & S. 286 (*z*).

2. B. writes in his book a memorandum of the terms of a sale, and heads it "Sold B." He then requires A.'s agent, C., to sign at the foot. B. has appropriated his written name at the head of the memorandum as his signature to the contract, as he required C. also to sign it. *Johnson v. Dodgson* (1837), 2 M. & W. 653 (*z*).

3. A. agrees to sell B. a ship, and draws up a memorandum of the terms of the sale, which he sends to B. B. makes certain amendments, and then signs and returns the memorandum to A., who strikes out B.'s amendments and inserts fresh ones. B. assents verbally thereto. This is a good signature by B. to the memorandum as last altered, as parol evidence is allowable to show the state of the document when it became a contract, and B. had retrospectively recognized his previous signature. *Stewart v. Eddowes* (1874), L. R. 9 C. P. 311.

Or his agent in that behalf.—"The agency may be proved by parol, as at common law, and may be shown by subsequent

(*r*) Benj. p. 234.

(*s*) *Stewart v. Eddowes* (1874), L. R. 9 C. P. 311.

(*t*) (1877), 2 Q. B. D. 314.

(*u*) Per Lord Ellenborough in *Hinde v. Whitehouse* (1806), 7 East, at p. 570.

(*x*) Per Smith, L.J., in *In re Hoyle* (1892), 62 L. J. Ch. 188.

(*y*) (1875), 1 Ex. D. 20.

(*z*) Followed in *Durrell v. Evans* (1861), 31 L. J., Ex. 337; 6 H. & N. 660, and *Evans v. Hoare*, [1892] 1 Q. B. 693; and see, on the question of signature (as regards its position), *Caton v. Caton* (1867), L. R. 2 H. L. 127.

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ratification, as well as by antecedent delegation of authority (a). . . . It is necessary that the agent be a third person, and not the other contracting party" (b). And the signature must be by the agent *quod* agent, *e.g.*, not merely as witness (c).

With regard to particular agents:—

Auctioneers.

An auctioneer is primarily the seller's agent (d); but at a public sale (e) the buyer, at the moment when the goods are knocked down, *primâ facie* (f) constitutes him an agent to make and sign a memorandum of the sale (g).

An auctioneer's clerk is not *primâ facie* the buyer's agent (h), but the facts may show that he was so appointed (i).

Brokers.

"When a broker has succeeded in making a contract, he reduces it to writing, and delivers to such party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note; to the buyer the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice" (k). "When the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance. . . . As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract, and it has also been held that it was not even admissible in evidence, or at all events, not without proof that the entry was . . . assented to" (l).

Broker's books and notes.

The law, as it appears from the cases, with regard to broker's books and notes, may be thus shortly summarized:—

(1.) The entry in the broker's book is the *primary* evidence of the contract (m); but consistent and sufficient notes, if varying

(a) *M'Lean v. Dunn* (1828), 4 Bing. 722; *Gosbell v. Archer* (1835), 2 A. & E. 500.

(b) *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720; Benj. pp. 241, 242.

(c) *Gosbell v. Archer*, *supra*.

(d) *Kenworthy v. Schofield* (1824), 2 B. & C. 945.

(e) *Emmerson v. Heelis* (1809), 2 Taunt. 38; *secus*, at a private sale, *Mews v. Carr* (1856), 1 H. & N. 484.

(f) *Bartlett v. Purnell* (1836), 4 A. & E. 792. See s. 58 (1), and

notes thereon.

(g) Benj. pp. 246—248.

(h) *Pierce v. Corf* (1874), L. R. 9 Q. B. 210.

(i) *Bird v. Boulter* (1833), 4 B. & Ad. 443.

(k) Benj. p. 251. For the various forms of notes, see *ibid*.

(l) Benj. p. 253.

(m) *Sievwright v. Archibald* (1851), 17 Q. B. 103, 115. See also on the consistency of the notes, *Caerleon Tin Plate Co. v. Hughes* (1891), 60 L. J. Q. B. 640.

from the entry, may be evidence of a *new* contract according to their terms (*n*). So also (there being no entry, but the contract being by correspondence) when the notes vary from the correspondence (*o*). S. 4 (1).

(2.) If there be no, or an insufficient, entry, consistent and sufficient notes together may form a memorandum (*p*); and either note, if sufficient, may also be such a memorandum, in the absence of proof of variance from the other note or the entry (*q*).

ILLUSTRATIONS [Agent for Signature].

1. A. agrees to sell goods to B. on the terms that the price payable shall go in reduction of a sum of 200*l.*, in which A. was indebted to B., the price payable to be settled at auction. At the auction the goods are knocked down by C., the auctioneer, to B. for 145*l.* C. is not B.'s agent to bind him by a signature to any conditions of sale, as the facts show that the real sale was not at auction. *Bartlett v. Purnell* (1836), 4 A. & E. 792.

2. A., an auctioneer, sells goods to B., and on the lot being knocked down, C., A.'s clerk, calls out B.'s name. B. then nods, and C. enters B.'s name as buyer. B. has constituted C. his agent to sign the conditions of sale. *Bird v. Boulter* (1833), 4 B. & Ad. 443.

3. A. agrees to sell a quantity of hops to B. C., A.'s agent, in the presence of A. and B., makes a memorandum of the terms of the sale in duplicate, putting a certain date upon it, which B. requests him to alter. B. then takes away his part of the memorandum. B. has constituted C., A.'s agent, as his own agent to sign the document. *Durrell v. Evans* (1862), 31 L. J. Ex. 337.

Sub-s. 2 re-enacts the provisions of Lord Tenterden's Act: see *ante*, p. 23 ("A contract for the sale"). S. 4 (2).

Sub-s. 3 defines acceptance under s. 4: see *ante*, p. 30 ("Acceptance"). S. 4 (3).

In Scotland the contract is completed by mutual consent without delivery, and without writing or any other solemnity. See *Brown on Sale*, s. 4; *Bell on Sale*, p. 63; 1 *Bell, Illustr.* p. 89. S. 4 (4).

Subject-matter of Contract.

5.—(1.) 'The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufac- Existing or
future goods.

(*n*) *Hawes v. Forster* (1834), 1 M. & R. 368, explained in *Sievwright v. Archibald* (1851), 17 Q. B. 103, 115.

(*o*) *Heyworth v. Knight* (1864), 17 C. B. N. S. 298.

(*p*) See note (*m*), *supra*.

(*q*) *Hawes v. Forster*, *supra*; *Parton v. Crofts* (1864), 16 C. B. N. S. 11.

In one case variance with the other note was held immaterial, as the latter was meant only as a report to the principal: *McCaul v. Strauss* (1883), Cab. & Ell. 106. See on both these heads, *Benj.*, more at large, pp. 268—270; and the authorities discussed pp. 253—267.

S. 5.

tured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

S. 5 (1).

Or possessed.—These words appear to refer to cases where the seller has not the "general property" in the goods, but at most a special property. See Part II. of the Act on transfer of title, s. 21 *et seq.*

This sub-section is declaratory of the previous law. Mr. Benjamin says:—

"In relation to executory contracts for the sale of goods not yet belonging to the seller, Lord Tenterden held, in an early case (*r*), at *nisi prius*, that if goods be sold, to be delivered at a future day, and the seller has not the goods nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go in the market and buy them, it is not a valid contract, but a mere wager on the price of the commodity. But this doctrine is quite exploded, and *Bryan v. Lewis* was expressly overruled . . . in *Hibblewhite v. McMorine* (*s*), and *Mortimer v. McCallan*" (*t*).

Subject of a contract of sale.—A sale must be intended. If the transaction, though in the form of a contract of sale of future goods, be, or involve, a wager, it will be void under 8 & 9 Vict. c. 109, s. 18, which is preserved by s. 61 (2) (3). Thus, *e.g.*, differences only may be agreed to be paid (*u*); or the ascertainment of the price may involve a wager (*x*). But, though the parties gain or lose according to the occurrence of some future

(*r*) *Bryan v. Lewis* (1826), R. & M. 386.

(*s*) (1839), 5 M. & W. 462.

(*t*) (1840), 6 M. & W. 58; Benj. p. 86; other cases are *Watts v. Friend* (1830), 10 B. & C. 446; and *Wilks v. Atkinson* (1815), 6 Taunt. 11; 1 Marsh. 412.

(*u*) *Grizewood v. Blane* (1851), 11 C. B. 526, explained in *Thacker v.*

Hardy (1878), 4 Q. B. D. 685. See also *Heiman v. Hardie* (1885), 12 Ct. of S. Cas. (4th series) 406.

(*x*) *Rourke v. Short* (1856), 5 E. & B. 904; *Brogden v. Marriott* (1836), 3 B. N. C. 88; *Harper v. Grain*, 38 Am. R. 589; cf. *Crofton v. Colgan* (1859), 10 Ir. C. L. R. 133, where the price only was to be ascertained without a wager.

event, there is not necessarily a wager, *e. g.*, the contract for the sale of next year's crop of a particular orchard (*y*). The test is whether *each party* under the contract may either win or lose—whether each will win or lose being dependent on the future uncertain event; and also whether the contract is mutually, *i. e.*, on both sides, a wagering contract (*z*).

S. 5 (1).

The acquisition of which depends upon a contingency.—This sub-section, like the last, is subject to the law with regard to wagering contracts preserved by s. 61 (2) (3).

S. 5 (2).

"The civilians held that an expectation dependent on a chance might be sold. . . . The rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the buyer to pay the price, even if no pearls were found; for, as was said by Chief Baron Richards, in *Hitchcock v. Giddings* (*a*), "If a man will make a purchase of a chance, he must abide by the consequences" (*b*).

Venditio spei.

In the above case the contingency, on which the acquisition of the goods by the seller was dependent, was the finding of the pearls in the oysters.

The sale of a chance, as defined above, must be distinguished from other cases (which also illustrate this sub-section) where goods are sold "to arrive" or "on arrival." In the latter class of cases, the presumed intention is not that the buyer shall take the risk, but *primâ facie* that the contract shall be void as against both parties if the contingency does not happen.

Goods sold
"to arrive"
or "on
arrival."

The rules applicable to such cases may be thus summarized. They are set out more at length by Mr. Benjamin (*c*):—

A contract for the sale of goods to arrive, or on arrival, by a particular vessel by a certain time, or otherwise, does not, in the absence of a contrary intention (*d*), import a warranty on the part of the seller that the goods shall so arrive: but the contract is deemed to be dependent upon the double contingency (*e*) of the arrival, in the ordinary course of navigation, within the time

(*y*) Per Bramwell, L.J., in *Borrowman v. Free* (1879), 4 Q. B. D. at p. 692.

(*z*) Per Hawkins, J., in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

(*a*) (1817), 4 Price, 135.

(*b*) Benj. p. 87. See also per

Lord Campbell, in *Hanks v. Palling* (1856), 6 E. & B. 659.

(*c*) pp. 565, 566, where the cases are cited.

(*d*) *Hals v. Rawson* (1858), 4 C. B. N. S. 85.

(*e*) *Johnson v. Macdonald* (1842), 9 M. & W. 600,

S. 5 (2). limited therefor, if any, of the vessel with the goods contracted for (f) on board.

And the contingency of the arrival of the goods is *probably* fulfilled by the arrival of the goods contracted for, though not consigned to the seller, nor under his control (g); and is *not* fulfilled by the arrival of similar goods (not being the ones contracted for) consigned to third persons (h).

This on the ground that (in the former case) the seller may buy the goods from the third person; and also that the seller should have guarded against such an impossibility in fact.

In a contract for the sale of goods to arrive, a stipulation that the seller shall declare the name of the vessel is a condition precedent to the liability of the buyer (i).

ILLUSTRATIONS.

1. A. agrees to sell B. all the oil on board the T. on arrival, delivery not to exceed a certain date. The T. arrives with the oil later. A. is not liable for non-delivery of the oil, nor would B. be bound to accept it. *Alewyn v. Prior* (1826), R. & M. 406.

2. A. agrees to sell B. the cargo of 400 tons, per the M., of Aracan Necrensis rice, provided the same were shipped on his account. The M. arrives with another description of rice. A. is not liable for non-delivery, as the particular description of rice contracted for did not arrive. *Vernede v. Weber* (1856), 1 H. & N. 311 (k).

3. A. agrees to sell to B. fifty cases of East India tallow, to be paid for fourteen days after landing, on the safe arrival of the C., then alleged to be on her passage. The C. arrives without any tallow. A. is liable to B. for non-delivery, as the contract was made contingent only on the arrival of the ship, the provision for payment only fixing the time if the goods arrived. *Hale v. Rawson* (1858), 4 C. B. N. S. 85.

S. 5 (3).

The seller purports to effect a present sale of future goods.—“In relation to things not yet in existence, or not yet belonging to the seller, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold are those which are said to have a *potential existence*; that is, things which are the natural product or expected increase of something already belonging to the seller. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time . . . and

(f) And of the quality contracted for: *Vernede v. Weber* (1856), 1 H. & N. 311; *Simond v. Braddon* (1857), 2 C. B. N. S. 324.

(g) *Fischel v. Scott* (1854), 15 C. B. 69.

(h) *Gorissen v. Perrin* (1857), 2 C. B. N. S. 681.

(i) *Reuter v. Sala* (1879), 4 C. P. D. 239; *Graves v. Legg* (1854), 9 Ex. 709.

(k) Cf. with this case *Simond v. Braddon*, *supra*, where a warranty was intended; and in America, *Dike v. Reitlinger*, 23 Hun. 241.

the sale is valid. But he can only make a *valid agreement to sell*, S. 5 (3).
not an actual sale, when the subject of the contract is something to be afterwards acquired, as the wool of any sheep . . . that he may buy during the year. . . . In an actual sale, the property passes, and the risk of loss is in the buyer, while in an agreement to sell . . . the risk remains in the seller" (l).

Mr. Benjamin goes on to show that the agreement will become a valid sale if the seller, after the goods come into existence, does some act giving effect to the transaction, or if the buyer take possession under a licence, that is to say, *interveniens novo actu*, "some new act or conveyance to give life and vigour to the declaration precedent" (m).

The law previously to this Act may therefore be summed up as follows :—

- (1.) Goods in *potential existence* may be presently assigned or sold (n).
- (2.) Other future goods cannot be presently assigned or sold *at law*; but in equity an assignment for value of such goods will pass an *equitable* interest in them when they come into existence, if they can *then* be sufficiently identified (o).
- (3.) The property in goods in (1) above, passes when the goods "are extant" (n), *i.e.*, in existence.
- (4.) The property in the goods in (2) passes *at law* when the seller does some act of appropriation, or the buyer takes possession under a licence (p).

Under sub-s. 3, a present sale of future goods is said to operate as an agreement to sell only, and no distinction is made between one class of future goods and another. But when would such an agreement become a sale; that is, what is the time that is to elapse, or the conditions that are to be fulfilled, subject to which the property is to pass? Under ss. 1 and 55, the parties may of course make any conditions they please. With regard to future goods not having potential existence, there seems no reason why the rules previously applicable should not continue to apply (being preserved by s. 61 (2)); and the property would pass by the "*novus actus interveniens*" of the seller, or the

(l) Benj. pp. 82, 83. See *Lunn v. Thornton* (1845), 1 C. B. 379, and other cases in Benj. *ibid.*

(m) Bacon's Max. reg. 14.

(n) *Grantham v. Hawley* (1603), Hob. 132, followed in *Petch v. Tutin* (1846), 15 M. & W. 110; Bac. Ab.

Grant D. (3).

(o) *Tailby v. Official Receiver* (1888), 13 Ap. Ca. 523; *Joseph v. Lyons* (1885), 15 Q. B. D. 280.

(p) *Lunn v. Thornton* (1845), 1 C. B. 379.

S. 5 (3).

buyer's taking possession under a licence as already pointed out, and the equitable be thus turned into a legal title (*q*).

It seems doubtful how far the character of goods as having a *potential* existence would now be recognized on the question of the transfer of the property. If it is, the property would pass as soon as the goods are "extant" (*r*), the contract until then being an "agreement to sell" under this sub-section.

Goods which
have ceased
to exist.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

S. 6.

Specific goods are defined in sect. 62 (1). "Perish" is not defined in the Act, but it is apprehended that the goods would perish, not only if they were physically destroyed, but also had ceased to exist in a *commercial* sense, i.e., with their identity destroyed (*s*). "As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows that if at the time of the contract the thing has *ceased to exist*, the sale is void. These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold: sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties, being founded on a mutual mistake of fact, was really no assent; there was no subject-matter for a contract, and the contract was therefore never completed" (*t*).

In cases under this section "it is not so much the impossibility of performance that is regarded as the original non-existence of the state of things assumed by the contracting parties as the basis of their contract. The main thing is to ascertain, not whether the agreement can be performed, but what was in the true intention and contemplation of the parties" (*u*).

Cases where the goods sold perish *after* the contract are dealt with in the following section.

(*q*) Per Brett, M.R., in *Hallas v. Robinson* (1885), 15 Q. B. D. at p. 291.

(*r*) *Grantham v. Hawley* (1603), Hob. 132.

(*s*) See per Parke, B., in *Barr v.*

Gibson (1838), 3 M. & W. at p. 400. *Qy.* whether the word "perishable" in s. 48 (3) also has this meaning?

(*t*) Benj. pp. 81, 82.

(*u*) Poll. on C. (5th ed.) p. 399.

ILLUSTRATION.

S. 6.

A. agrees to sell to B. a specific cargo of goods then supposed to be on its way from Bombay. At the date of the contract the cargo, unknown to both parties, had heated, and had been sold by the master. The contract is void. *Couturier v. Hastie*, (1856) 5 H. L. C. 673.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

Goods
perishing
before sale
but after
agreement
to sell.

Cases under this section fall under the principle that from the nature of the case the parties must be presumed to have contemplated the continued existence of a specific thing. When that thing perishes the contract of sale is avoided by virtue of an implied condition subsequent excusing performance. Had the goods not been specific, the ordinary principle of law would apply, *i.e.*, that impossibility of performance would not have excused.

S. 7.

It will be seen from the judgment in *Howell v. Coupland* (v), that goods are sufficiently specific if they are the produce of specific land, though not in existence at the date of the contract. It is apprehended that the definition of "specific goods" in sect. 62 (1), does not modify the law on this point.

"Where, from the nature of the contract, it appears that the parties from the beginning must have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract *they must have contemplated such continued existence as the foundation* of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor" (w).

"No doubt there is a distinction in the present case [*i.e.*, as compared with that mentioned in s. 6], that the potatoes, the things contracted for, were not in existence at the time the contract was entered into. But can that make any real difference in principle? Supposing the potatoes had been full grown

(v) (1876), 1 Q. B. D. 258.

(w) Per Cur. in *Taylor v. Caldwell* (1863), 3 B. & S. 826.

S. 7.

at the time of the contract, and afterwards the disease had come and destroyed them, according to the authorities (x) it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. This is not the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things" (y).

Without any fault . . . perish before the risk passes to the buyer.—"Fault" is defined in s. 62 (1) as "wrongful act or default," and is also found in ss. 9 (2) and 20. It was defined as equivalent to culpable negligence in *The Famenoth* (z).

It follows that, when either party is in fault, he is not excused from performing his part, and cannot recover damages against the other for non-delivery or non-acceptance, as the case may be.

"Fault" as affecting transfer of risk.

This section should be read with s. 20, which shows that risk of any loss "which *might* not have occurred but for" the fault of either party in delaying delivery, attaches to that party. These are very wide words, and it would seem that where the buyer delays delivery, and the loss might not otherwise have occurred, the "risk" spoken of in this section would pass to him, and, consequently, the seller would be excused from delivering. Similarly, if the delay was caused by the seller. The liability of either party, it will be observed, is heavier under s. 20 than under the present section. Under the latter, the fault must apparently be the *direct cause* of the destruction of the goods. Under s. 20, the fault need only be the *possible cause*; see notes to s. 20, *post*, p. 145.

If the goods perish *after* the risk passes to the buyer, either by virtue of the passing of the property, or by the buyer's having agreed to or being compelled to take the risk, the buyer is liable for the price under s. 49 without delivery (a).

ILLUSTRATIONS.

1. A. agrees to sell B. 200 tons of potatoes, of which the greater part is not then sown, from certain lands, at 3*l.* 10*s.* a ton. The potatoes are afterwards sown, and are amply sufficient in ordinary seasons to produce 200 tons. Before maturity, disease, without the fault of A., attacks the crop, and A. is only able to deliver eighty tons. A. is not liable to B. for the non-delivery of the 120 tons, as he only agreed to sell 200 tons out of a crop to be grown on specific land. *Howell v. Coupland* (1876), 1 Q. B. D. 258.

(x) *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Appleby v. Myers* (1867), L. R. 2 C. P. 651.

(z) (1882), 7 P. D. 207.

(a) See *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436; *Castle v.*

(y) Per Mellish, L.J., in *Howell v. Coupland* (1876), 1 Q. B. D. 258.

Playford (1870), L. R. 7 Ex. 98.

2. A. agrees to sell to B. a specific horse on the terms that B. should try the horse and pay for him at the end of eight days, if satisfactory. The horse dies, without B.'s fault, within the time. B. is not liable for the price of the horse, as the property, i.e., risk, did not pass to him unless at the end of eight days he kept the horse. *Elphick v. Barnes* (1880), 5 C. P. D. 321 (b).

S. 7.

3. A. agrees to sell to B. certain specific titlers of sugar at so much a hundredweight, to remain at A.'s risk for two months, and to be weighed when delivered to the purchaser. After the two months the titlers are consumed by fire, without fault of A. or B. B. is liable to pay for the sugar, the risk having passed to him (1) [Probably] by reason of the passing of the property; (2) At any rate, because he took the risk after two months. *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436 (c).

The Price.

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

Ascertain-
ment of price.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Price is defined in s. 1 (1).

S. 8 (1).

Fixed in manner thereby agreed.—*e.g.*, by valuation under s. 9. But the fixing of the price must not involve a wager, otherwise the contract is void (d). For the ascertainment of the price when at the option of the seller, see notes to s. 27, *post*, p. 175.

When the price is to be determined by the course of dealing between the parties, it would be determined according to their implied contract, as they presumably contract with reference to their previous course of dealing.

As to interest on the price, see notes to s. 54. The price of goods sold, duty-paid, may, when the duties have been changed since the contract, be increased or decreased, in the interest of the seller or buyer, as the case may be, by virtue of the 39 & 40 Vict. c. 36, s. 20 (Customs Consolidation Act, 1876).

(b) Cf. *Chapman v. Withers* (1888), 20 Q. B. D. 824.

(d) *Brogden v. Marriott* (1836), 3 B. N. C. 88; *Rourke v. Short* (1856),

(c) See also *Castle v. Playford* (1870), L. R. 7 Ex. 98.

5 E. & B. 904.

S. 8 (1).

The above rules, &c. would be preserved by s. 61 (2), (3) of the Act.

For the effect of payment to the true owner of goods sold without title, see notes to s. 27, *post*, p. 175.

S. 8 (2).

A reasonable price.—This sub-section is based upon the rule originally laid down, with regard to executed contracts, by *Acebal v. Levy* (d), and, with regard to executory contracts, by *Hoadley v. McLaine* (e).

The current price of goods at the port of shipment is not necessarily a reasonable one, as it may depend on exceptional circumstances (d).

Where the rate of price has been fixed, but the exact calculation is impossible by reason of the perishing of the goods, the jury must make such estimate as they reasonably can (f).

Agreement
to sell at
valuation.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

S. 9 (1).

This sub-section is based upon *Thurnell v. Balbirnie* (g), and the proviso upon *Clarke v. Westrope* (h).

On the terms.—"It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases, they are, of course, bound by their bargain, and the price when so fixed is as much part of the bargain as if fixed by themselves. But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement; and if the persons appointed as valuers fail, or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should

(d) (1834), 10 Bing. 376.

(e) *Ibid.* 482. See in Am. *Shealy v. Edmunds*, 49 Am. R. 43.(f) Per Blackburn, J., in *Martineau**v. Kitching* (1872), L. R. 7 Q. B. at p. 456.

(g) (1837), 2 M. & W. 786.

(h) (1856), 18 C. B. 765.

himself be the cause of preventing the valuation (*i*). But if the agreement has been executed by the delivery of the goods, the seller will be entitled to recover the value estimated by the jury, if the buyer should do any act to obstruct or render impossible the valuation, as in *Clarke v. Westrope* (*j*).

S. 9 (1).

An agreement for a valuation is not a submission to arbitration under the Common Law Procedure Act (17 & 18 Vict. c. 125, s. 12) (*k*).

Cannot or does not make such valuation.—The Act in this sub-section does not expressly refer to the case where one party has been the cause of the valuer not acting. In such a case, however, he would be in "fault," under sub-s. 2, and liable to an action for damages.

If the valuer accepts the employment and makes default, he also is liable in damages (*l*); and collusion by the buyer with the valuer, would be a fraud (*m*).

The valuation, being a personal act, cannot be delegated. Accordingly, the buyer will *prima facie* not be liable on the valuation of the valuer's agent (*n*). In such a case the appointed valuer "does not" act.

Provided.—This proviso is based upon *Clarke v. Westrope* (*o*). It is an illustration of the general principle of law, thus stated in a leading work (*p*), as applying to "cases in which the special contract, being unperformed, a new contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance." The buyer will be liable to pay a reasonable price for the goods which he has accepted under a new implied contract under s. 3, *ante*, p. 19.

Appropriated.—It is apprehended that the "appropriation," though not a technical term like "acceptance," is equivalent thereto, and that "appropriation" means a taking to the goods by the buyer as owner under s. 35, whether or not he has consumed them. "Appropriate" is defined in *Metropolitan Ry. Co. v. Fowler* (*q*) as "to take and keep a thing by exclusive right."

(*i*) *Cooper v. Shuttleworth* (1855), 25 L. J. Ex. 114; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529.

(*j*) Benj. p. 90.

(*k*) *Bos v. Helsham* (1866), L. R. 2 Ex. 72; *Re Dawdy* (1885), 15 Q. B. D. 426.

(*l*) *Jenkins v. Beetham* (1854), 15 C. B. at p. 187; *Turner v. Goulden*

(1873), L. R. 9 C. P. 57.

(*m*) *Batterbury v. Vyse* (1863), 2 H. & C. 42.

(*n*) *Ess v. Truscott* (1837), 2 M. & W. 385.

(*o*) (1856), 18 C. B. 765.

(*p*) 2 Sm. L. C. (9th ed.) at p. 34,

notes to *Cutler v. Powell*.

(*q*) (1893), 62 L. J. Q. B. at p. 557.

S. 9 (1).

ILLUSTRATIONS.

1. A. agrees to sell to B. certain goods on the valuation of C. on behalf of A., and D. on behalf of B. C. is ready and willing to value, but D. neglects to do so, though he is not hindered by B. C., after notice to B., values the goods at 500*l*. B. is not liable to A. for non-acceptance or non-payment. *Thurnell v. Balbirnie* (1837), 2 M. & W. 786.

2. A., an outgoing tenant, agrees to sell to B., the incoming, the hay and straw on the premises on the valuation of C. and D. Before the valuation B. consumes the goods. B. must pay the price as reasonably estimated. *Clarke v. Westrope* (1856), 18 C. B. 765.

S. 9 (2).

Fault is defined in s. 62 (1), *infra*, as "wrongful act or default." For possible definition, see under ss. 7 (*ante*, p. 60) and 20 (*post*, p. 146).

An action for damages.—It is not quite clear whether an "action for damages" means an action for preventing the valuation, but the phraseology of the sub-section seems to mean this. See on this, *Thomas v. Fredericks* (r). This is according to the principle that "Where . . . parties have agreed that something shall be done, which cannot effectually be done, unless both concur in doing it . . . each agrees to do all that is necessary to be done on his part for the carrying out of that thing" (s).

*Conditions and Warranties.*Stipulations
as to time.

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale "month" means *primâ facie* calendar month.

S. 10 (1).

Unless a different intention.—One case is provided for by the Act in s. 48 (4), *infra*, where, by virtue of an express condition subsequent, the seller may repudiate the contract. So, also, under s. 55, the parties may expressly agree, *e. g.*, upon a ready money bargain, *i. e.*, that the property shall not pass except on payment or delivery (t); or that otherwise punctual payment shall be a condition precedent to the transfer of the property.

(r) (1847), 10 Q. B. 775.

(s) Per Lord Blackburn, in *Mackay v. Dick* (1881), 6 Ap. Ca. at p. 263, quoting *Y. B. 9 Edw. 4; Easter Term, 4A.*

(t) Per Bayley, J., in *Bishop v. Shillito* (1819), 2 B. & A. 329, n.; *Loeschman v. Williams* (1815), 4 Camp. 181.

Stipulations as to time : These are divided by this section into— S. 10 (1).

(1.) Stipulations as to time of payment :

(2.) Other stipulations.

And both may or may not be “of the essence” of the contract, i. e., conditions precedent.

Firstly, with regard to stipulations as to the time of *payment*. (1) Stipulations as to time of payment.

“By the law of England, differing in this respect from the civil law, the buyer’s default in paying the price will not justify an action for the rescission of the contract, unless the right be expressly reserved (u). The principle at common law is that the goods have become the property of the buyer, and that the vendor has agreed to take for them the buyer’s *promise* to pay the price. If, then, the buyer fail to pay, the vendor’s remedy is limited to an action [under s. 49] for the breach of *that* promise, the damages for the breach being the amount of the price promised, to which may be added interest” (x) under s. 54.

(1) Stipulations as to time of payment.

And Lord Denman says, in *Martindale v. Smith* (y):—“The sale of a specified chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the creditor a right of action for the price, and a lien on the goods if they remain in his possession till the price is paid. But that default in payment does not rescind the contract.”

On this question the following clear exposition of the rationale of the law is given by Lord Blackburn (z):—

“In an agreement amounting to a bargain and sale, a failure in the punctual payment of the price never can literally go to the whole consideration for the sale. The property is transferred from the moment of the bargain, and with the property the risk. The purchaser, therefore, during the interval between the completion of the bargain, and the time when he becomes in default, is liable to the risk of the loss of the goods. . . . If the parties, by the terms of their agreement, show an intention to make the punctual payment of the price of the essence of the contract, they may do so; but it seems that in such cases the agreement does not amount to a bargain and sale, and that, consequently, the property and risk remain with the vendor. It is perfectly obvious that, in addition to this liability to the risk of loss, . . . the buyer may . . . have undertaken many things besides the payment of the price, and, consequently, that the buyer, though in

(u) See s. 48 (4).

6 B. & C. p. 362.

(x) Benj. p. 763. See per Holroyd, J., in *Turling v. Baxter* (1827),

(y) (1841), 1 Q. B. at p. 395.

(z) p. 449.

S. 10 (1).

default as to payment, may have conferred benefit to the vendor under the contract."

It will be seen from the above extracts that the reasons for the rule are:—(1) that the stipulation as to time does not go to the whole consideration of the sale; and (2) delivery may take place before the time of payment, and the seller is consequently relying, not on performance by the buyer, but on his promise to pay (a).

This rule is, with regard to the property in specific goods, adopted in this Act (b), following the common law (c).

But failure in punctual payment may, coupled with other facts, e. g., the buyer's insolvency and his notice thereof to the seller, amount to an invitation to the seller to rescind the contract which the latter may accept (d). And such failure without insolvency may also show an intention of the buyer's no longer to be bound by the contract, and in the same way amount to an offer to rescind (e). The application of the rule to the case of goods deliverable by instalments is dealt with in s. 31.

(2) Other stipulations as to time.

Secondly, with regard to other stipulations as to time. The rule is thus stated by Mr. Benjamin (f):—"In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations with regard to it will be held conditions precedent." And, as in all cases of conditions, the rules in *Pordage v. Cole* (a), as to the order of performance of the various promises, and the extent of the operation of the consideration, will apply.

It may here be mentioned that the Judicature Acts have not extended to mercantile contracts the equitable rule as to time of performance applicable to contracts for the sale of land (g).

In some cases, stipulations as to time may amount to *words of description* of the goods sold, and consequently be of the essence of the contract under s. 13, e. g., where goods are to be shipped

(a) See rules in *Pordage v. Cole* (1669), 1 Wms. Saund. 548, quoted in notes to *Cutter v. Powell* (1795), 2 Sm. L. C. (9th ed.) p. 1; per Lord Selborne in *Mersey, &c. Co. v. Naylor* (1884), 9 Ap. Ca. p. 439.

(b) s. 18, Rule 1.

(c) Per Holroyd, J., in *Tarling v. Baxter* (1827), 6 B. & C. p. 362.

(d) *Morgan v. Bain* (1874), L. R. 10 C. P. 15; *Ex parte Stapleton* (1879),

10 Ch. D. 586; *Ex parte Chalmers* (1873), 8 Ch. Ap. 289.

(e) *Withers v. Reynolds* (1831), 2 B. & Ad. 882; *Mersey, &c. Co. v. Naylor*, *supra*.

(f) p. 583, approved per Folger, J., in *Higgins v. Delaware Ry. Co.*, 60 N. Y. 557.

(g) Per Cotton, L.J., in *Reuter v. Sala* (1879), 4 C. P. D. at p. 249.

within a particular time. See the notes to that section, *post*, S. 10 (1).
p. 88.

Other cases are of contracts providing that a declaration shall be made by the seller to the buyer within a particular time of some fact on which the latter relies *to enable him to act*, as, *e. g.*, to go into the market to resell the goods. An instance is where the seller has to declare the particulars of the shipment, or the date of the bill of lading, or the name of the vessel (*h*). "In mercantile contracts," says Thesiger, L.J. (*i*), "like the present, the making within a given time of a declaration or declarations upon which the buyer may act, is an essential feature of such contracts."

So, also, the *date* of the bill of lading of goods to be shipped may be a condition (*k*).

For contracts of sale of goods "to arrive" within a particular time, see notes to s. 5 (2), *ante*, p. 55.

Month.—The same meaning is given to "month" in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. S. 10 (2).

"The word 'month,' although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a *calendar* month (*l*). And the Court will look at the context in all cases to see whether a calendar month was not intended, and if so, will adopt that construction" (*m*).

ILLUSTRATIONS.

1. A. sells to B. six stacks of oats to be paid for on a particular day. B. does not pay on that day, but tenders the price two days afterwards. A. refuses the money, and afterwards sells the oats. He is liable to B. in trover, as the contract still exists, and A.'s lien is gone by B.'s tender. *Martindale v. Smith* (1841), 1 Q. B. 389.

2. A. agrees to sell B. 5,000 tons of steel, deliverable 1,000 tons monthly, and each instalment to be paid for within three days after receipt of shipping documents. A. in the first month delivers only 332 tons, and 260 tons in the early part of the next month. A. then becomes insolvent, and B. refuses to pay for the instalments delivered, whereupon A. refuses further deliveries. A. is liable to B. for non-delivery, as, payment by B. for each instalment not being a condition precedent to the delivery of that instalment, there is no intention that it should be a condition precedent to the delivery of the residue. *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434.

3. A. agrees to sell B. 300 tons of rice to be shipped in March and
or

(*h*) *Reuter v. Sala* (1879), 4 C. P. M. & W. 473; *Reg. v. Chawton*
D. 239; *Graves v. Legg* (1864), 9 (1841), 1 Q. B. 247; *Hart v. Middleton*
Ex. 709. (1846), 2 C. & K. 9.

(*i*) *Reuter v. Sala*, *supra*, at p. 246.

(*m*) *Simpson v. Margitson* (1847),

(*k*) *Gathorne v. Adams* (1862), 12
C. B. N. S. 560.

11 Q. B. 23; *Webb v. Fairmanor*,
supra; *Lang v. Gale* (1813), 1 M. &

(*l*) *Webb v. Fairmanor* (1838), 3 S. 111; *Benj.* p. 686.

S. 10 (2).

April at a particular place. B. resells. All but a very small portion of the rice is put on board in February. Having regard to (1) the express stipulation amounting to a description of the goods; (2) the fact that B. might reasonably require to know when to expect delivery so as to be ready with funds for payment; and (3) the fact that B. was bound to third persons by contract to deliver the rice, the stipulation as to the time of shipment is a condition precedent to B.'s liability to accept the rice. *Bovess v. Shand* (1877), 2 App. Cas. 455.

4. A. sells B. goods by auction, one of the conditions of sale being that the goods shall be taken away within three days, otherwise the deposit to be forfeited and the goods resold. B. does not clear the goods within the time, but comes shortly afterwards to do so. A. had in the meantime delivered the goods to C. A. is liable for non-delivery, as there was no condition precedent binding on B., as B.'s default was only a partial breach of the consideration. *Woolfe v. Horne* (1877), 2 Q. B. D. 355.

5. A. agrees to sell to B. 2,000 tons of rails to be shipped to Philadelphia, payment to be made in exchange for the bill of lading, and it is stipulated that the bill shall be forwarded to B. in time to reach him before the arrival of the ship, or before charges are incurred by him in respect thereof on landing. This stipulation as to time is not of the essence of the contract, as it does not go to the whole consideration for B.'s promise to accept and pay for the goods. Per Brett, M.R., in *Sanders v. McLean* (1883), 11 Q. B. D. at p. 336.

6. A. agrees to sell to B. 300 bales of wool, to be shipped with all dispatch in a particular month, and the name of the vessel to be declared by A. on shipment. The wool is unsaleable by B. unless he receives notice of shipment. B. is not liable to accept the wool unless (1) it is shipped with all dispatch in the month named; and (2) the name of the vessel be declared. *Graves v. Legg* (1854), 9 Ex. 709 (n).

When condition to be treated as warranty.

11.—(1.) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

S. 11 (1) (a).

In England or Ireland.—For the law in Scotland, see sub-s. (2), *post*, p. 76.

Warranty is defined in s. 62 (1) of this Act. “**Condition**” is not so defined in the Act, but appears by implication, from ss. 11 and 62 (1), to be an essential term, a breach of which entitles the buyer to reject the goods, and treat the contract as repudiated. The definition is in accordance with the previous law (o). The definition of warranty is based upon the celebrated judgment of Lord Abinger in *Chanter v. Hopkins* (p), in which he protested against confounding warranty with condition. Both are *parts of*

(n) See *Reuter v. Sala* (1879), 4 C. P. D. 239.

(o) See per cur. in *Behn v. Burness* (1863), 3 B. & S. 751.

(p) (1838), 4 M. & W. 399.

the contract; but the latter is fundamental and essential, the former only collateral; but both are more than mere representations, *not forming part* of the contract at all. See on this distinction, the notes to clause (b), *infra*, p. 70. S. 11 (1) (a).

The buyer may waive the condition, or may elect.—Sub-s. (1), clause (a), deals with voluntary acts of the buyer with reference to conditions to be performed by the seller. Clause (c), on the other hand, deals with the *compulsory* election of the buyer. The buyer under this clause, then, has two courses open to him if he does not rely upon the non-performance of the condition, viz. :—

- (1.) To waive the condition : or
- (2.) To elect to consider it only as a warranty.

If he relies upon the condition, he may, of course, in addition to any other defence, recover the price paid, as on a consideration which has wholly failed, under s. 54 (g).

Having regard to the wording of this clause as compared with clause (c), the buyer being allowed an alternative, *i.e.*, of waiver or election, it seems probable that by “waiver” an express or voluntary waiver is meant. The waiver necessarily implied from a prevention of the performance of the condition, &c., as being a legal excuse of non-performance, would seem more logically to fall under sub-s. (3), and these cases are accordingly there discussed, *post*, p. 77. Waiver
(express).

With regard to the waiver under this clause, “no authority is needed for the proposition that the party, in whose favour the condition has been imposed, may expressly waive it” (r), as the maxim, *Quilibet renunciare potest juri pro se introducto*, applies.

The buyer’s election “to treat the breach of the condition as a breach of warranty,” means that he has elected not to repudiate the contract, but to accept the goods. On this Mr. Benjamin says (s) :— Election to
rely on
warranty.

“The buyer will also lose his right of returning [*i.e.*, rejecting] goods delivered to him under a [condition] of quality, if he has shown by his conduct an acceptance of them. . . . This does not constitute an abandonment of his remedy by cross action, or his right to insist in defence upon a reduction of price.”

Having, then, shown his election by an acceptance of the goods, defined in ss. 34 (1) and 35, the buyer has the remedies defined in s. 53, *q. v. (t)*.

“The second proposition, that the buyer may, after receiving and accepting the goods, bring his action for damages, in case

(g) *Heilbutt v. Hickson* (1872), L.
R. 7 C. P. 438.

(s) p. 946.

(t) See also *Benj.* p. 940.

(r) *Benj.* p. 547.

S. 11 (1) (a). the quality is inferior to that warranted by the seller, needs no authority. It is taken for granted in all the cases, there being nothing to create an exception to the general rule, that an action for damages lies in every case of a breach of a promise made by one man to another for a good and valuable consideration" (u).

ILLUSTRATIONS.

1. A. agrees to sell to B. a quantity of Calcutta linseed, *tale quale*. A. delivers linseed containing such an admixture of foreign seeds as to destroy the distinctive character of Calcutta linseed. B. resells the linseed as such. B. has elected to treat A.'s breach of condition only as a breach of warranty that the seed was Calcutta linseed. *Wieler v. Schilizzi* (1856), 17 C. B. 619.

2. A. agrees to sell to B. fifty-eight bales of prime singed bacon at 68s. a hundredweight, to be paid for by bill. The bacon delivered is tainted. B. inspects the bacon and gives a bill for the price. B. has accepted the bacon, and elected to sue A. on a warranty that the bacon was as described. *Yates v. Pym* (1816), 6 Taunt. 446.

3. A. agrees to sell to B. by sample a quantity of shoes for the use of the French army. B. inspects the shoes and pays for them. On delivery in France they are found in many cases to contain paper in the soles. This defect could not be discovered by mere inspection or otherwise than by cutting open the soles. B.'s inspection, being inefficacious, was no acceptance, and consequently no election to rely upon a breach of warranty; and B. may rely upon A.'s breach of condition, and reject all the shoes and recover the price paid. *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438.

(b) Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract.

S. 11 (1) (b). On the question whether a stipulation in a contract is a warranty, a condition, or a mere representation, the Court, in *Behn v. Burness* (v) (which is rightly considered to be the *locus classicus* on the subject), stated the law as here summarized (w):—

(1.) A representation (i. e., a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it,

(u) Benj. p. 942.

(v) (1863), 3 B. & S. 751.

(w) See (more at large) Benj. pp. 543—545.

and whether or not contained in a written document) S. 11 (1) (b).
may be either—

- (a) A mere representation, having no effect except by way of fraud, or in certain classes of contract, as *e. g.*, insurance: or
 - (b) A substantive part of the contract (x).
- (2.) If it be the latter, then it may be either—
- (a) A condition: or
 - (b) A warranty or independent agreement as defined in s. 62 (1).

This clause of the sub-section lays down the rule that the question “warranty or condition?” depends upon the construction of the contract, without regard to the use of the term “warranty.” It must be read subject to the limitation upon the buyer’s rights contained in clause (c), *post*, p. 73.

The intention of the parties “cannot depend on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract” (y); and the question of intention is to be determined “by the application of common sense to each particular case; to which intention, when discovered, all technical forms of expression must give way” (z).

That the particular term employed is immaterial is apparent when it is considered that there is no substantial difference between a contract for goods of a specified quality, and a contract for goods *warranted* to be of such quality; in both cases the whole consideration for the buyer’s promise to accept and pay is the seller’s promise to supply goods of the quality contracted for. In all cases the ordinary rule applicable to conditions governs the contract, the question being whether the seller’s promise “goes to” the whole consideration for the buyer’s. The subject is dealt with at large in the notes to *Pordage v. Cole* (a), and *Cutter v. Powell* (b), to which the reader is referred.

Bowen, L.J., makes, in this connection, the following pregnant remarks in his judgment in *Bentsen v. Taylor, Son & Co.* (c):—

“When a contract is entered into between two parties, every representation made at the time of the entering into the contract may be or may not be intended as a warranty, or as a promise that the representation is true. Where the representation is not contained in the written document itself, it is for the jury to say

(x) It may be, however, that the common law rule as to a representation being necessarily a *part* of a contract is abrogated. The question is discussed under s. 61 (2), *q. v.*

(y) *Per Lord Ellenborough in Ritchie*

v. Allinson (1808), 10 East, 295.

(z) *Per cur. in Stavers v. Curling* (1836), 3 B. N. C. 355.

(a) (1669), 1 Wms. Saund. 548.

(b) (1796), 2 Sm. L. C. (9th ed.) 1.

(c) [1893] 2 Q. B. 280, 281.

S. 11 (1) (b). whether the real representation amounted to a warranty. . . . But when you have a representation made in a written document, it is obviously no longer for the jury, but for the Court, to decide whether it is a mere representation, or whether it is what is called (I admit not very happily) a 'substantive part of the contract,' that is, a part of the contract which involves a promise in itself. It might be necessary to take the opinion of the jury on matters of fact which would throw light on the construction. . . . But, assuming the Court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will be no longer bound by the contract. . . . There is no way of deciding that question *except by looking at the contract in the light of the surrounding circumstances*, and then making up one's mind whether the intention of the parties . . . will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look at is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. Then, again, it might be necessary to have recourse to the jury."

ILLUSTRATIONS.

1. A. agrees to sell to B. 300 bales of wool, to be shipped with all dispatch, and to be delivered at O. in a particular month, the name of the vessels to be declared as soon as the wool was shipped. A. knows that the wool is bought for re-sale by B., and both parties also know that wool fluctuates greatly in price, and is unsaleable until the names of the vessels in which it is shipped are declared. A. makes an unreasonable delay in declaring the names of the vessels, and in the meantime the wool greatly falls in price. B. refuses to accept the wool on arrival. B. is justified in so doing, as under the circumstances the declaration of the names of the vessels was a condition.

B. would also be justified in refusing had the goods not been shipped with all dispatch. *Graves v. Legg* (1854), 9 Ex. 709.

2. A. agrees to sell to B. as many of A.'s gas coals of a specified quality as B.'s steam vessel could carry during nine months from S. to L. A. ships inferior coal during a number of shipments, and also makes an unreasonable delay in those shipments. Neither A.'s

express promise to supply proper coal, nor his implied one to use due diligence in shipment, are conditions, as a partial breach by A. was not under the circumstances a frustration of the contract, and B. cannot repudiate. *Jonassohn v. Young* (1863), 4 B. & S. 296. S. 11 (1) (b).

3. A. agrees to sell and ship to B. at P. 2,000 tons of rails at 82s. a ton, payment to be made in exchange for the bill of lading, and A. engages to forward the bill of lading to B. in time to allow B. to send it on to meet the arrival of the goods, or before charges are incurred by B. in respect thereof. Neither stipulation is a condition to be performed by A., but only a warranty, as the delay in forwarding the bill might be very little, and the charges incurred might be very small, and the value of the cargo being great, the seller's breach would not go to the whole consideration for B.'s promise to accept and pay. Per Brett, M.R., in *Sanders v. McLean* (1883), 11 Q. B. D. at p. 336.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract express or implied to that effect.

By this clause the buyer (in the absence of a special term to the contrary (d)) must treat the breach of a condition only as a breach of warranty in two cases, viz. :— S. 11 (1) (c).

(1.) If he has accepted part of the goods under an entire contract :

(2.) After a sale of specific goods.

In both cases the buyer "is compelled" to treat the condition as a warranty under s. 53; and his rights are as stated in that section.

Firstly, with regard to part acceptance under an entire contract. As to these contracts, see ss. 30, 31. "Acceptance" is here, as in clause (a), used in the sense of s. 35, not of s. 4. (1) Acceptance under an entire contract.

"Where the contract is entire, as in *Giles v. Edwards* (e), and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some other form of action" (f).

(d) As to this, see *Towers v. Barrett* (1786), 1 T. R. 133; *Bannerman v. White* (1861), 10 C. B. N. S. 844. (e) (1797), 7 T. R. 181.
(f) Benj. p. 398.

S. 11 (1) (c).

The principle is that the buyer "by not repudiating the contract has affirmed it" (g). "If I bargain for the purchase of ten horses . . . and the seller delivers only nine, I may say to him: 'I will not accept them; my bargain was for ten.' But if, instead of so doing, I take the nine horses and use them, that which was at one time a condition precedent by my conduct has become no condition precedent" (h). The same rule would apply to conditions of quality, &c.

"Where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore, the law *obliges* him to perform the agreement on his part, leaving him to his remedy to recover any damages he may have sustained in not having received the whole consideration. . . . When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed than to say it was not a condition precedent at all" (i). So, also, "he may have the benefit of the breach of contract, if any, in reduction of the amount claimed" (k).

The Act says, it must be noticed, "part of the goods," not, as stated in some of the cases (l), "a substantial part."

But the buyer, though compelled to treat a breach of condition as a breach of warranty, as explained in s. 53, may, under the latter section, in some cases exercise rights closely analogous to a right of repudiation, as when he is able to defend the seller's action for the price *to the whole extent* of the price, as in *Poulton v. Lattimore* (m). On this point, see notes to s. 53 (1) (a), *post*.

This sub-section should also be read in connection with s. 54. Under that section the buyer, having paid the price, may recover it when the consideration for the payment has wholly failed, as, *e. g.*, where there is a breach of the seller's condition under s. 12, and the buyer has been evicted (n); or where there is a complete difference of substance between that of the goods contracted for

(g) Per Channell, B., in *White v. Beeton* (1861), 7 H. & N. 42.

(h) Per Bramwell, B., *ibid.* See on this, s. 30 (1).

(i) Per cur. in *Graves v. Legg* (1854), 9 Ex. 709. See also Benj. p. 546.

(k) Per cur. in *Fust v. Dowie* (1865), 34 L. J. Q. B. 127.

(l) See *Behn v. Burness* (1862), 3 B. & S. 761, and *Ellen v. Topp* (1851), 6 Ex. 424.

(m) (1829), 9 B. & C. 259. See notes to *Cutter v. Powell* (1796), 2 Sm. L. C. (9th ed.) 1.

(n) *Eichholz v. Bannister* (1864), 17 C. B. N. S. 708.

and those delivered (o), within the meaning of the rule laid down in *Kennedy v. Panama Mail Co.* (p). See notes to s. 54, S. 11 (1) (o).
post.

Secondly, with regard to sales of specific goods. "If a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract (g)), but must have recourse to an action for damages (r) in respect of the breach of warranty" (s). (2) Sale of specific goods.

"Where the property in goods has passed to the buyer *unconditionally*, the law gives him no right to rescind the contract in the absence of an express stipulation to that effect, and the property therefore remaining in him he is bound to pay the price, even if he reject the goods which still remain his. His proper remedy is, therefore, to receive the goods, and to exercise the rights explained [in s. 53]. . . . The cases in which it has been held that, on the sale of a specific chattel, the buyer's remedy is confined to a cross-action, or to a defence by way of reduction of the price, are all cases of the *bargain and sale* of a special chattel *unconditionally*, when, consequently, the property had become vested in the buyer" (t).

A similar statement will be found in *Street v. Blay* (u).

ILLUSTRATIONS.

1. A. agrees to sell to B. by sample a number of bags of rice at a price per pound. B. examines the bulk and finds it inferior to sample, and afterwards attempts to sell it. B., having accepted the goods, must pay for them (but may sue A. for breach of warranty that the goods should be according to sample). *Parker v. Palmer* (1821), 4 B. & A. 387 (x).

2. The facts being otherwise as in Illustration 1, *ante*, page 72, B. accepts part of the wool. B. must pay the price, but may sue A. for breach of warranty, that the names of the vessels should be declared, and that the wool should be shipped with all dispatch. *Per cur.* in *Graves v. Legg* (1854), 9 Ex. 709.

3. A. agrees to sell to B. fifteen sacks of flour of a particular quality. B. pays the price. B., on delivery, uses half a sack, and

(o) *Gompertz v. Bartlett* (1853), 2 E. & B. 849.

(p) (1867), L. R. 2 Q. B. 580, 587.

(q) See *Bannerman v. White* (1861), 10 C. B. N. S. 844.

(r) See on this, s. 53 (1).

(s) *Per cur.* in *Behn v. Burness* (1862), 3 B. & S. at p. 755.

(t) *Benj.* pp. 934, 936.

(u) (1831), 2 B. & Ad. 456, 462.

(x) See also *Chapman v. Morton* (1843), 11 M. & W. 534.

S. 11 (1) (c). then complains of the quality, and then uses two more. B. cannot repudiate the contract and recover the price paid. *Harnor v. Groves* (1855), 15 C. B. 667.

4. A. agrees to sell to B. cinq foin seed warranted to be good new growing seed. After delivery the seed is examined by an expert, and shown not to be good growing seed; but B. sows part and sells the residue. The seed proves wholly unproductive. B., though he cannot repudiate the contract *in toto*, may treat the breach as a breach of warranty, i. e., show, as an answer to A.'s action for the price, that the seed was wholly worthless. *Poulton v. Lattimore* (1829), 9 B. & C. 259.

5. A. sells to B. a specific horse for 90*l.* (which B. pays), and warrants him sound. The horse is unsound. B. cannot return the horse and recover from A. the 90*l.* *Gompertz v. Denton* (1832), 1 C. & M. 207.

6. A. sells B. a specific horse for 43*l.* warranted sound. The horse is unsound. B. cannot return him to A., but may, in an action by A. for the price, give evidence of unsoundness in reduction of the price on the ground of a breach of warranty. *Street v. Blay* (1831), 2 B. & Ad. 456.

7. A. agrees to sell B. by sample a quantity of hops at a price to depend on weight, and it is expressly stated by B. that he would not contract if sulphur had been used in the cultivation of them. In fact, sulphur had been used. The goods otherwise correspond with the sample on delivery, and are weighed and their price ascertained. B. accepts the hops. B. is not bound to pay for them, as there was an express condition that the contract should be null and void if sulphur was used. *Bannerman v. White* (1861), 10 C. B. N. S. 844 (y).

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

S. 11 (2). This sub-section re-enacts the 19 & 20 Vict. c. 60, s. 5 (the Mercantile Law Amendment (Scotland) Act, 1856), which is repealed by this Act. (See s. 60, and schedule of repealed enactments.)

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

S. 11 (3). By reason of impossibility or otherwise.—This sub-section

(y) This case may also be treated as one of an essential misrepresentation of fact excluding consent: see s. 61 (2).

excepts from the operation of the preceding two sub-sections conditions and warranties the performance whereof is by law excused by reason of— S. 11 (3).

(1.) Impossibility :

(2.) Other reasons.

With regard to (1), antecedent and subsequent impossibility in fact, by reason of the perishing of specific goods, is dealt with in sects. 6 and 7. See the question of impossibility discussed by Prof. Pollock (z) and Mr. Benjamin (a). Under the same head may fall impossibility caused by events expressly or impliedly provided for in the contract as grounds of excuse, i. e., as forms of discharge, like the "excepted risks" of charterparties (b). (1) Impossibility.

With regard to (2), which deals with other grounds of excuse admitted by law. Under this head would seem to fall cases of— (2) Other grounds of excuse.

(1.) Illegality :

(2.) Implied waiver.

With regard to illegality, see Prof. Pollock (c) and Mr. Benjamin (d).

As regards waiver, *express* waiver is dealt with in clause (a), ante, p. 69; and perhaps the term "waiver" there employed may also include *implied* waiver. But it is convenient, and perhaps more logical, to consider such cases under the present sub-section, which speaks of *legal excuses* for non-performance. Waiver (implied).

On the subject of implied waiver Mr. Benjamin says (e):—

"The necessity for performing a condition precedent may be *waived* by the party in whose favour it is stipulated . . . by the implication resulting from his acts or conduct. This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes *the other party* in fulfilling the condition, or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle or useless for the other to fulfil the condition . . . If a man offer to perform a condition precedent in favour of another, and the latter refuse to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashurst, J., in delivering the opinion of the King's Bench, in *Hotham v. East India Co.* (f),

(z) On Contracts (5th ed.), pp. 379 et seq.

(a) pp. 552 et seq.

(b) See *De Oleaga v. West Cumberland Iron Co.* (1879), 4 Q. B. D. 472.

(c) On Contracts (5th ed.), pp. 347 et seq.

(d) Bk. 3, ch. 3.

(e) p. 547, where a long list of cases is cited.

(f) 1 T. R. 645.

S. 11 (3).

said, that it was evident from common sense, and therefore needed no authority to prove it, that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, "it is equal to performance (g). On the same principle, a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent. . . . But a mere assertion that the party will be unable or will refuse to perform his contract, is not sufficient: it must be a distinct and unequivocal refusal to perform the promise (h), and must be treated and acted on as such by the party to whom the promise was made; for if he afterwards continue to urge or demand compliance with the contract, it is plain he does not understand it to be at an end" (i).

There are, therefore, two grounds of implied waiver, viz. :—

- (1.) Prevention by the other party of the performance of the condition :
- (2.) Dispensation with its performance, as when the party entitled to performance of the condition renounces, or makes himself unable to perform, his own part of the contract.

These are instances of the general rule applicable to contracts generally.

ILLUSTRATIONS.

1. B. agrees to buy of A. a digging machine, provided it fulfilled the condition of being capable of excavating a certain quantity of clay in a given time upon a properly opened-up face in a railway cutting. B. is to open up the face, but fails to do so, though repeatedly requested by A. B. must pay for the machine without the test, as he has impliedly waived the performance by A. of the condition. *Mackay v. Dick* (1881), 6 Ap. Ca. 251.

2. A. agrees to make and sell to B. 3,900 tons of railway chairs deliverable at certain places at various times, and to be paid for one month after delivery. A. delivers, and B. accepts, 1,787 chairs, but as to the residue, B. tells A. that he will not want any more. A. is ready and willing to manufacture and deliver the balance of the chairs, but in fact does not manufacture them after B.'s refusal, which is never retracted. A. is entitled to recover damages against B. for his non-acceptance of the chairs, as the condition that A. should be ready and

(g) This principle is as old as the Y. B., 9 Edw. 4, E. T. 4A.

(h) The latter clause was quoted with approval by the C. A., in *Gueret v. Audouy* (1893), 62 L. J. Q. B. at

p. 638.

(i) Benj. p. 548. See also per Maule, J., in *Sands v. Clarke* (1849), 8 C. B. at p. 762, citing *Mayne's Case* (1596), 5 Co. Rep. 25 a.

willing to deliver them was waived by B. by his implied offer to A. (which A. accepted) to rescind the contract. *Cort v. Ambergate Railway Co.* (1851), 17 Q. B. 127 (*k*). S. 11 (3).

3. A. agrees to sell to B. a third interest in a cargo of tea of a certain description on arrival at C., and to be paid for after delivery. Before the arrival of the ship at C., B. refuses to accept the tea and to be bound by the contract, and does not withdraw the refusal. B. has waived the condition of delivery to be performed by A., and is liable for a non-acceptance of the tea. *Ripley v. McClure* (1849), 4 Ex. 345.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is— Implied undertaking as to title, &c.

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :

(3.) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

The effect of sub-s. (1) is to remove any doubt, if such existed after the decision in *Eichholz v. Bannister* (*l*), in relation to the existence of an implied "warranty of title" on the sale of personal chattels. It was well settled that in an executory agreement, the seller impliedly warranted his title in the goods which he promised to sell (*m*) ; but, prior to the decision in *Eichholz v. Bannister* (*n*), it is undoubtedly true that the opinions of judges (*o*) and of text-writers (*p*) gave support to the proposition that on a S. 12 (1).

(*k*) See also *Gueret v. Audouy* (1893), 62 L. J. Q. B. 633.

(*l*) (1864), 17 C. B. N. S. 708 ; 34 L. J. C. P. 105.

(*m*) Benj. p. 622.

(*n*) *Vide supra*.

(*o*) See, in particular, the elaborate opinion of Parke, B., in *Morley v. Attenborough* (1849), 3 Ex. 500.

(*p*) See Co. Litt. 102 (a) ; Noy's *Maxims*, 42.

S. 12 (1).

sale of a chattel, the seller, by the mere act of sale, does not assert that he is owner of the goods sold, or, in other words, warrant his title thereto.

The history of the subject is thoroughly discussed and the authorities reviewed by Mr. Benjamin (*q*), who comes to the conclusion that, as the result of the decision in *Eichholz v. Bannister* (*r*), the alleged common law rule has been altered, and that in all cases there is a warranty of title, "unless it be shown by the facts and circumstances of the sale that the seller did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold" (*s*). The first clause of sub-s. 1 adopts the opinion thus expressed.

Unless the circumstances show a different intention, *i. e.*, an intention to negative the implication. As, for example, when the seller, expressly or by implication, sells only such title as he has (*t*). A particular instance is a sale by a sheriff, who is only bound on an implied warranty that he is *not aware of* any defect of title (*u*). And this latter warranty, it is submitted, applies universally to cases where the seller is selling in a *special or limited capacity*, and not generally as owner (*x*). In such cases, as the seller has not ordinarily the means of knowing the title to the goods, the *scienter* should be proved (*y*). Another special instance is that of a pawnbroker (*z*). A different intention may also be inferred from the nature of the subject-matter sold, *e. g.*, a patent right (*a*).

And not the circumstances only, but the terms, express or implied, of the contract, may, under s. 55, *post*, negative or vary the implied condition and warranties arising under this section.

An implied condition.—As a *condition* is implied, the buyer may, on a breach thereof, repudiate the contract (under s. 11 (*a*)) and recover the price paid on the ground of a failure of consideration (*b*) (under s. 54), or may treat the breach as a breach

(*q*) Benj. pp. 622—635.

(*r*) (1864), 17 C. B. N. S. 708.

(*s*) Benj. p. 634. Stephen, J., arrived at the same conclusion in *Raphael v. Burt* (1884), Cab. & Ell. 325; and see *Edwards v. Pearson* (1890), 6 Times R. 220.

(*t*) *Morley v. Attenborough* (1849), 3 Ex. 500; *Chapman v. Speller* (1850), 14 Q. B. 621; 19 L. J. Q. B. 239.

(*u*) *Peto v. Blades* (1814), 5 Taunt. 357; in America, *Bashore v. Whisler*,

3 Watts, 490.

(*x*) See Add. on C. (8th ed.), pp. 971, 972.

(*y*) *Hoe v. Sanborn*, 21 N. Y. 552.

(*z*) *Morley v. Attenborough* (1849), 3 Ex. 500; 18 L. J. Ex. 149.

(*a*) *Hall v. Conder* (1857), 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; *Smith v. Neale* (1857), 2 C. B. N. S. 67; 26 L. J. C. P. 143.

(*b*) *Eichholz v. Bannister* (1864), 17 C. B. N. S. 708.

of warranty only (under s. 11 (a.)). And a breach, it is apprehended, takes place at the time the property is to pass by the contract, and without eviction of the buyer; and the Statute of Limitations would run from that date (d). In America some Courts hold that eviction is necessary to the cause of action (e).

S. 12 (1).

A right to sell—i.e., a right to pass the absolute or general property in the goods sold. The transfer of any limited interest, not being a sale within the meaning of the Act (see s. 1 (1), and definition of “property” in s. 62 (1)), it follows that this sub-section cannot apply to such a transaction.

It may be noted that the seller impliedly affirms, not that he is the owner of the goods sold (f), but that “he has a right to sell” them. It is conceived, however, that the latter affirmation will be, in effect, equivalent to the former (g). The expression “right to sell” was probably substituted in order to cover the case of a sale by one who is not owner, but has a power to sell conferred on him by the owner or by law, e.g., an agent of the owner, or a pawnee, public officer, or ship’s master.

ILLUSTRATIONS.

1. A., a job warehouseman, sells to B. a lot of prints, yarns, &c., and B. pays the price. The goods were stolen goods, and B. is compelled to restore them to the true owner. B. can recover from A. the price paid. *Eicholtz v. Bannister* (1864), 17 C. B. N. S. 708.

2. A., who had bought goods at a sheriff’s sale, agrees to sell the bargain to B. for 5*l.* additional. B. takes delivery of the goods, and is afterwards compelled to give them up to a person with a superior title. A. is not liable to B. for a breach of warranty of title, as the circumstances of the case show that he only sold B. what title he himself had. *Chapman v. Speller* (1850), 14 Q. B. 621.

3. A., a pawnbroker, sells to B. at auction a quantity of unredeemed pledges as such. A. has not warranted title thereto, as he professed only to sell pledges whereof the time of redemption had expired. *Morley v. Attenborough* (1849), 3 Ex. 500.

An implied warranty . . . quiet possession.—In this sub-section, and in sub-s. 3, only a warranty is implied; and consequently, under s. 53 (1), the buyer will have no right to repudiate the con-

S. 12 (2).

Quiet enjoyment.

(d) See *Kingdon v. Nottle* (1815), 4 M. & S. 53, quoting Shep. T. 170; 2 Dart’s V. & P. (6th ed.) p. 881.

(e) *Cass v. Hall*, 24 Wend. 102; *Buss v. Putney*, 38 N. H. 44; *contra* (acc. to the English rule), *Perkins v. Whelan*, 116 Mass. 542.

(f) See the judgments, *passim*, in *Eicholtz v. Bannister* (1864), 17 C. B. N. S. 708.

(g) It may be observed that the qualified covenant for title implied under s. 7 of the Conveyancing Act is not equivalent to an assertion of ownership, but is only an affirmation that the vendor sells the estate “in the same plight in which he received it, and not in any degree made worse by him.” Per Lord Eldon in *Browning v. Wright* (1799), 2 B. & P. at p. 22.

S. 12 (2).

tract, the implied engagement being merely collateral to the main contract. The reasonableness of this engagement being treated only as a warranty is obvious, as *quiet* possession and freedom from incumbrance do not, in the phrase of the cases and text books, necessarily "go to the whole consideration" of the sale. The interference with the possession, or the amount of the incumbrance, may, *e.g.*, be small and trivial. Under sub-s. 1, on the contrary, a failure of title naturally goes to the whole consideration of the sale.

The above warranty is an addition to the previous law: cf. the similar covenant in the Conveyancing Act, 1881, s. 7 (1)(A). According to the analogy of covenants to the same effect in leases, &c., a breach would take place only on the disturbance of the buyer in his possession.

Lord Ellenborough thus states the difference between covenants for title and for quiet possession in *Howell v. Richards* (h): "The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon."

Shall have and enjoy.—These words apparently cover a liability of the seller not only to allow the buyer "to enjoy," but also to *obtain* quiet possession, which, however, the seller is bound to give, as an essential part of his contract, under s. 27, and it seems unnecessary to superadd a liability under a *warranty*. Accordingly, the words may probably be interpreted as referring to the maintenance of the buyer's quiet possession only, though the *dicta* in *Hawkes v. Orton* (i) show that there is a distinction between "having" and "enjoying." If the word "have" is to be strictly interpreted, the buyer has an additional right under a *warranty* against the seller for not *giving* quiet possession; and this sub-section may, perhaps, be intended to apply to a case where the buyer has in fact obtained possession, but not without trouble and expense.

It should be noticed that the words of the warranty are very wide. There is no limitation, either of time or with respect to the kind of acts against which the buyer is to be protected, or the persons by whom those acts are done. The warranty is apparently a warranty continuing as long as the buyer holds possession of the goods, and extending to the acts of all persons. Acts of the seller himself may, of course, be left out of consideration. But with respect to the acts of third persons, it is pre-

(h) (1809), 11 East, at p. 642.

(i) (1836), 5 A. & E. 367.

sumed that some limitation must be made of the generality of the terms of the clause. Now a covenant for quiet enjoyment (on which the present provision is modelled) must always be construed reasonably, and so as not to give the covenantee a security which was beyond the possible intention of the parties, and it cannot be treated as an absolute warranty that nothing should happen to interfere with the quiet enjoyment (*k*). And the rule of the common law, which is as old as the Year Books (*l*), applicable to covenants of indemnity, and such like, was that a covenant against the acts of all the world, other than the covenantor, was a covenant to be limited *prima facie* to all lawful acts; *secus*, in the case of a covenant against the acts of a particular person. This on the ground that the former covenant would otherwise be unreasonable. Lord Ellenborough well puts the reason of the rule (*m*):—"When a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import; that is, to rightful title." The rule, in fact, is a rule of construction.

As this is a codifying Act (though no doubt the provision is new), and as words well understood, and previously in use, like "have" or "hold and enjoy," are used with reference to "quiet possession," it would seem that the reasonable interpretation of this sub-section is to confine its operation to the same class of cases as covenants for quiet enjoyment in general terms were previously confined to, viz., to acts, rightful or wrongful, of the seller himself, but only to lawful acts of third persons, and in both cases only to the reasonable consequences of such acts, as in *Harrison v. Muncaster* (*k*).

Goods free from any charge, etc., not declared.—Having regard to the fact that the stipulation implied by this sub-section is a warranty only, and that the case where there is a total absence of title in the seller is dealt with, as an essential stipulation, in sub-s. (1), it would seem that this sub-section is intended to meet cases where the buyer has obtained and kept possession of the

S. 12 (2).

S. 12 (3).
Freedom from
incumbrances.

(*k*) Per Bowen, L.J., in *Harrison & Co. v. Muncaster* (1891), 61 L. J. Q. B. at p. 105. *v. Essex*, Hob. 34; notes to *Wotton v. Hele* (1669), 2 Wms. Saund. 526.

(*l*) Y. B. 22 H. 6, fol. 26; *Foster* M. & S. 379, 380. See also *Toule v. Walsh* (1822), 1 B. & C. 29.

S. 12 (3).

goods, but is precluded from the free enjoyment of them by reason of some charge thereon. If the buyer has not obtained possession of the goods by reason of the incumbrance, there would be no delivery by the seller at all, under s. 27 (n). Similarly a case may, perhaps, be imagined where the effect of the incumbrance would be to prevent the goods being of the description contracted for under s. 13. So if he has been compelled to give them up to the true owner, sub-s. (1) and s. 54 would apply. But this sub-section would meet a case, *e.g.*, when the buyer has taken and retained possession of the goods, but has been compelled to discharge a lien thereon; though he would of course be also able to sue the seller on the *quasi* contract implied from the compulsory payment.

The provision in this sub-section also appears to be new. The research of the editors has discovered one case only in which the existence of such a warranty was discussed, that of *Sanders v. Maclean* in 1883 (o). The point was not necessary for the decision of the case, but the Master of the Rolls expressed the opinion (p) that the stipulation, if implied, must be of the nature of a warranty, and not a condition. The only other authority is a passage from Mr. Benjamin's treatise. "The transfer of such documents (*i.e.*, documents of title) would, of course, not be a sufficient delivery by the vendor, if the goods represented by the documents were subject to liens or charges in favour of the bailees" (q). *Playford v. Mercer* (r) was the case of an *express* contract for the sale of goods from the deck.

The goods shall be free.—The seller does not warrant that the goods *are* free from incumbrances at the date of the contract, but, in effect, that the quiet possession under sub-s. (2) shall not be disturbed by incumbrances. This, at any rate, is the effect of s. 7 of the Conveyancing Act, on which, presumably, sub-s. 3 of this Act is modelled. Under s. 7 of the Conveyancing Act, separate covenants are not, as in s. 12 of this Act, implied for quiet possession, *and* for freedom from incumbrances, but *one* covenant is implied that the subject-matter shall be quietly enjoyed, and *that* freed from incumbrances. The mere existence, therefore, of an incumbrance, which does not interfere with the quiet enjoyment, does not involve a breach of the covenant (s). The breach arises on disturbance (t) when the

(n) See Benj. p. 705.

(o) 11 Q. B. D. 327.

(p) at p. 337.

(q) Benj. p. 705.

(r) (1870), 22 L. T. N. S. 41.

(s) On this point, see Dart V. & P. p. 880.

(t) Clerk & Humphrey on Sales, p. 512.

freedom from incumbrances is infringed, *i.e.*, it would seem (on the analogy of indemnities), when the buyer is damnified by payment (u). S. 12 (3).

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Sale by description.

Bowen, L.J., makes (v) the following remarks on the subject of implied warranties in general, which form an instructive introduction to the consideration of this and the two following sections:—"An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is, in all cases, founded upon the presumed intention of the parties and upon reason. The implication which the law draws from *what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side.* . . . I believe if one were to take all the cases . . . it would be found that in all of them the law is raising an implication from the presumed intention of the parties. . . . In business transactions, . . . what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men—not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils and chances." And, says Lord Esher, quoting the above words (x), "it is not enough that the implication should be a reasonable implication; it must be a necessary implication."

"When a seller sells an article by a particular description, it is a condition precedent to his right of action that the thing

(u) *Collings v. Heywood* (1839), 9 A. D. 64.
& E. 633.

(x) In *Hamlyn & Co. v. Wood & Co.*

(v) In *The Moorcock* (1889), 14 P. (1891), 60 L. J. Q. B. at p. 736.

S. 13.

which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying: . . . 'In many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another, and he send him beans, he does not perform his contract; but that is not a warranty: there is no *warranty* that he should sell him peas, the *contract* is to sell peas, and if he sell him anything else in their stead, it is a non-performance of it" (t). . . . If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price paid as money had and received to his use (u). Whereas, in case of warranty, the rules are very different" (x).

"It is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. . . . If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it" (y).

The rule that the goods supplied shall agree with their description in the contract is the general rule, of which the other implied warranties or conditions mentioned in s. 14 are particular examples. "In some contracts," says Brett, J.A., in *Randall v. Newson* (z), "the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed, or expressly stated, that the fundamental undertaking is, that the *article offered or delivered shall answer the description of it contained in the contract*. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the

(t) *Chanter v. Hopkins* (1838), 4 M. & W. at p. 404.

(u) See s. 54, and notes.

(x) Benj. pp. 597, 598.

(y) Per Lord Blackburn, in *Bowes v. Shand* (1877), 2 Ap. Ca. at p. 480.

(z) (1877), 2 Q. B. D. at p. 109.

subject-matter of the bargain of purchase, or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that [it] . . . shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, . . . it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description."

The condition is not excluded by reason only that the contract also contains (1) an express warranty relating to some particular quality of the goods (*a*); (2) an express stipulation allowing for a certain latitude with regard to, or limiting the seller's liability for, their quality (*b*). But, apparently, when the seller expressly contracts against liability for *errors* of description, the condition will not be implied (*c*).

When the goods are ordered of a manufacturer who is not also a dealer, there is, in the absence of any express stipulation or trade usage under s. 55, allowing him to supply goods made by other manufacturers, an implied condition that he will supply only goods of his own make. This was first decided by the majority of the Court of Appeal in *Johnson v. Raylton* (*d*), and the law, as there laid down, is preserved by s. 61 (2) of this Act; and may also fall under this section if home-make be considered as an *implied description* of the goods superadded to their ordinary commercial description. The reason of the rule appears obvious in the case of such goods, for example, as Purdey's guns, or Moët's champagne, which class of cases, however, is probably sufficiently protected by the provisions of the Merchandise Marks Act, 1887; but it also applies generally, though the make of the particular manufacturer is no better than that of others. The buyer is, in fact, "*assumed* to have contracted with the particular manufacturers in reliance upon the general excellence of the work of their firm" (*e*); and "it cannot make any difference whether the goods happen to be in existence, or in stock, or whether they have still to be made" (*f*).

Implied condition that goods are manufacturer's own make.

Brett, L.J., lays stress upon the fact that the buyer has had

(*a*) *Nichol v. Godts* (1854), 10 Ex. Benjamin, Law Gazette, May 26, 1891.

(*b*) *Azumar v. Casella* (1867), L. R. 2 C. P. 677; *Gorton v. Macintosh Co.* (1883), 31 W. R. 232. (*d*) (1881), 7 Q. B. D. 438.

(*c*) *Taylor v. Bullen* (1850), 5 Ex. 779. See also *Drysalter's Co. v.* (*e*) Per Cotton, L.J., *ibid.* at pp. 445, 446. (*f*) Per Brett, L.J., *ibid.* at p. 452.

S. 13.

no inspection of the goods. If, however, the home manufacture of the goods be treated as part of their description, it would appear immaterial whether or not the buyer had inspection, unless such inspection revealed the fact (*g*). Cotton, L.J., states the rule *simpliciter*.

In view, however, of the powerful dissentient judgment delivered by Bramwell, L.J., in *Johnson v. Raylton*, the question is one which cannot be regarded as finally settled, until it has been adjudicated upon by the House of Lords.

Time of shipment may form part of description.

In some cases the *time of shipment* of the goods sold is part of their description (*h*). The rule as to the fulfilment of this condition may be stated as follows:—

The condition as to shipment will be fulfilled—

- (1.) If the respective dates of the commencement and completion of the loading fall within the specified period, although a bill of lading may not be given till afterwards (*i*); and
- (2.) [Perhaps] also, when the shipment takes place as one continuous transaction, which is finally completed within the period (*k*).

And shipment *by the seller* is *prima facie* unnecessary, if the goods otherwise fulfil the condition (*l*).

And if the sale be also by sample.—When goods are bought under a specified commercial description, either by sample, or even after an inspection of the bulk, “it is an implied term, notwithstanding the sample and inspection, that the goods shall reasonably answer the specified description in a commercial sense” (*m*). The sample in such cases is looked upon as a mere expression of the *quality* of the article, and not of its *essential character*.

For the additional conditions implied on a sale by sample, see s. 15 (2), *post*, p. 103.

ILLUSTRATIONS.

1. A. agrees to sell to B. a quantity of Calcutta linseed, *tale quale*, then at sea. Calcutta linseed generally contains from two to three per cent. of foreign seeds. The seed delivered by A. contains fifteen per cent. The jury find that the admixture destroys the distinctive

(*g*) See *Josling v. Kingeford* (1863), 13 C. B. N. S. 447.

(*h*) *Bowes v. Shand* (1877), 2 Ap. Ca. 455. In America, *Norrington v. Wright*, 115 U. S. 188; *Tilley v. Pope*, *ib.* 213.

(*i*) *Bowes v. Shand*, *supra*.

(*k*) S.C., and *Alexander v. Vanderzee* (1872), L. R. 7 C. P. 530.

(*l*) So in America, in *Cunningham v. Judson*, 100 N. Y. 179.

(*m*) Per Willes, J., in *Mody v. Gregson* (1868), L. R. 4 Ex. at p. 55.

character of the seed as Calcutta linseed. A. is liable to B. for a breach of warranty. *Wieler v. Schilizzi* (1856), 17 C. B. 619.

2. A., a dealer in acid, sells to B. oxalic acid, of which B. inspects both samples and the bulk. A. declines to warrant the quality. The acid contains ten per cent. of sulphate of magnesia, which could not be detected, and which destroys the character of the acid. A. is liable to B. for breach of warranty. *Josling v. Kingsford* (1863), 13 C. B. N. S. 447.

3. A. agrees to sell to B. five parcels of foreign refined rape oil, warranted only equal to samples. A. delivers the oil, which corresponds with the samples, but is rape oil adulterated with hemp oil. The jury find that oil so adulterated is not rape oil. B., although the bulk corresponded with the sample, is not bound to take it, as there was a difference in kind. *Nichol v. Godts* (1854), 10 Ex. 191.

4. A. agrees to sell to B., by sample, certain cotton. The sample is long staple Salem cotton. A. expressly warrants it equal to sample, and also agrees that, if the cotton be inferior to sample, a fair allowance shall be made. A. delivers to B. Western Madras cotton, inferior to the Salem sample. B. is not bound to accept the cotton with an allowance, as there was a difference in kind. *Azemar v. Casella* (1867), L. R. 2 C. P. 677.

5. A., a calico printer, agrees to sell to B., a dye extract manufacturer, a quantity of spent madder, which is the refuse of A.'s processes of manufacture. A. delivers spent madder, which is found useless by B. B. must pay for it, as the article delivered answered the description. *Turner v. Mucklow* (1862), 6 L. T. N. S. 690.

6. A. agrees to sell to B. 300 tons of Madras rice, to be shipped at Madras during March ^{and} or April. Nearly all the rice is put on board in February. B. is not bound to accept the cargo, as it was substantially a February shipment, and the time of shipment was part of the description of the rice, and A. has consequently not tendered the thing contracted for. *Bowes v. Shand* (1877), 2 Ap. Ca. 455 (n).

7. A., an iron manufacturer, agrees to sell to B., a shipbuilder, 2,000 tons of iron ship-plates, of the quality known as "Crown" (which is A.'s trade mark), to pass Lloyd's survey. A. is not a dealer in iron. A. makes some deliveries, and then closes his works, and claims to supply plates made by other manufacturers of Crown quality, and equal to Lloyd's survey, and as good as A.'s own manufacture. There is no custom of trade allowing A. to supply other makers' goods. B. is not bound to accept the plates, as the description of plates he contracted for was plates manufactured by A. *Johnson v. Raylton* (1881), 7 Q. B. D. 438.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- (1.) Where the buyer, expressly or by implication, makes known to the seller the particular

Implied conditions as to quality or fitness.

(*) Some of the Lords in this case said they would not go outside the words of the contract to seek for motives. Others showed how the stipulation as to time might be very material.

purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

- (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.
- (3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Subject to the provisions of this Act.—See s. 15 (accordance with sample).

And of any statute.—*E.g.*, The Chain Cables and Anchors Act, 1874 (37 & 38 Vict. c. 51, s. 4) (o): The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 17): The Hops (Prevention of Frauds) Act, 1866 (29 & 30 Vict. c. 37): The Fertiliser and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56): and cf. The Sale of Foods and Drugs Act, 1875 (38 & 39 Vict. c. 6), which

(o) See *Hall v. Billingham* (1886), 54 L. T. N. S. 387.

imposes a statutory responsibility, but under which a warranty is not implied. S. 14.

There is no implied warranty or condition as to quality or fitness.—“Quality,” by s. 62 (1), includes “state or condition.” Rule of *caveat emptor*.

“The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale . . . So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality” (p).

“In general, when an article is offered for sale, and is open to the inspection of the buyer, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are *caveat emptor*, and *simplex commendatio non obligat*. If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the seller a warranty of any matters the risk of which he is unwilling to take on himself” (q).

ILLUSTRATIONS [*Caveat emptor*].

1. A., a farmer, buys from C., a butcher, a pig hanging in C.’s shop. B., another farmer, afterwards sees the pig in the shop, and buys it of A. The pig is found to be measly. A. is not liable to B. on any warranty of soundness, as B. bought on his own judgment. *Burnaby v. Bollett* (1847), 16 M. & W. 644 (r).

2. B., a butcher, buys from A., a general meat salesman, a carcass, which he previously inspects. On being cooked it is found to be unfit for food. A., though a general dealer, is not liable to B. on any warranty of quality or fitness, as B. inspected the carcass, and therefore bought on his own judgment. *Emmerton v. Matthews* (1862), 7 H. & N. 586 (s).

3. A. exposes for sale in the market a number of pigs, and they are sold to B. with all faults, and expressly without any warranty, and on the terms that B. may inspect the pigs. The pigs die of typhoid fever. A. is not liable to B. on any warranty that the pigs are free from disease.

In the above case, A.’s sending the infected pigs to market was a statutable offence. The sending to market was no implied warranty by A. that the pigs were free from disease. *Ward v. Hobbs* (1878), 4 Ap. Ca. 13.

(p) *Benj.* p. 637.

(q) *Ibid.* pp. 404, 405

(r) This case was decided on the ground that A. was not a dealer; cf. this case with *Emmerton v.*

Matthews, supra, where the seller was a dealer.

(s) See also *Smith v. Baker* (1878), 40 L. T. N. S. 261.

S. 14 (1).

Implied condition of fitness.

Such being the state of the law, various implied conditions (which may be treated as warranties under s. 11, *supra*), have been in some cases implied as against the seller. These are stated in section 14 and the following.

Goods shall be reasonably fit for such purpose.—This sub-section may be shortly summed up as requiring, in order to found an implication of condition of fitness in the goods supplied—

- (1.) Knowledge by the seller of the particular purpose: and
- (2.) An order for goods in which the seller deals in the way of his business.

The rule is thus stated by Mr. Benjamin (t):—"If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose: *aliter*, if the buyer purchases on his own judgment." And Erskine, J., says, in *Brown v. Edgington* (u): "When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for such purpose. If a purchaser himself selects the article, it has been held that the mere fact that the vendor knew the use for which it was designed, will not raise an implied warranty, because the skill and judgment of the latter are not relied on in making the purchase." A particular instance of the case lastly referred to by the learned judge is stated in the proviso to this sub-section.

The rule, as also that relating to merchantableness and conformity with sample, is only a branch of the rule dealing with the description of goods under s. 13. See the judgment in *Randall v. Newson* (x), quoted *ante*, p. 86.

Extends to latent defects.

As, therefore, the governing principle is that the thing offered and delivered must answer the description of it which is contained in the contract, "if the article or commodity offered or delivered does not in fact answer its description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable" (x). Accordingly, there is no implied exception as to latent defects in the condition here discussed, and the seller will be liable for any such defect which renders the goods in fact unfit (y). And the cases show that, when the defect is latent, the buyer may be relying on the seller,

(t) p. 658.

(u) (1841), 2 M. & G. 279.

(x) *Randall v. Newson* (1877), 2 Q. B. D. at p. 109.

(y) *Randall v. Newson*, *supra*, where the previous cases are collected and discussed.

although he may have selected the particular goods, as in *Jones v. Bright* (z). S. 14 (1).

And the rule as to latent defects has also been applied to a case where the buyer bought of the *builder* a particular barge, then incomplete, which he did not inspect during its building, and wherein a warranty was implied against the seller as to latent defects rendering the barge unfit for ordinary use as a barge (a).

For the rule in cases where the goods are to be dispatched to, or delivered at, a distant place, see notes to sub-s. (2), and s. 33, *infra*.

Expressly or by implication makes known.—A knowledge by the seller of the purpose for which the goods are required may be imputed to him by reason of the character or name of the goods ordered. "There seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats and other garments" (b). But "when the article may be used as one of the elements in a variety of other manufactures . . . it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials" (c).

And the goods are of a description, &c.—As the buyer must rely upon the seller's skill or judgment, and not upon his own, it follows that, if the seller agrees to supply an article which he does not deal in, and about which he presumably has no more scientific knowledge than the buyer, the buyer will, in making the purchase, be relying upon his own judgment, and the implied warranty or condition will be negatived (d).

Such a case may also be considered as an instance of the rule laid down in *Chanter v. Hopkins* (e) (which is stated in the proviso to this sub-section, *post*, p. 94), where the buyer defined the particular article he wanted, and took the risk of its adaptability in consequence.

The seller may, of course, expressly warrant that the goods are fit, even when he does not deal in the goods (f).

(a) (1829), 5 Bing. 533. See per Lord Macnaghten, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 299.

(e) *Shepherd v. Pybus* (1842), 3 M. & G. 868, followed in *America* in *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

(b) Per Lord Herschell, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 293.

(c) *Ibid*.

(d) *Turner v. Mucklow* (1862), 6 L. T. N. S. 690, quoted in illustration, *post*, p. 95, appears to be an instance of this.

(e) (1838), 4 M. & W. 399.

(f) See the analogous case of *Hydraulic Engineering Co. v. Spencer* (1886), 2 Times L. R. 554.

S. 14 (1).

The same principle has been applied to a case where the seller contracts to supply goods according to the buyer's plan. In such a case he fulfils his contract if he make the goods in a workmanlike manner according to the plan, whether or not they are unfit (*g*).

Whether he be a manufacturer or not.—*Jones v. Bright* (*h*) had settled the law with regard to a manufacturer; and in *Brown v. Edgington* (*i*) it was intimated by the Court *obiter* that the same rule applied to a dealer. The law was stated generally of both a manufacturer and dealer in *Jones v. Just* (*k*).

Excluded in the case of a specified, patent, &c., article.

Provided that, etc.—The rule laid down in this proviso is an illustration of the larger rule that where the buyer defines the particular kind of goods he wants, he is presumed to be purchasing on his own judgment, and not on the seller's (*l*), though the buyer may also state the purpose for which the goods are required. In such a case the statement of the purpose is not considered *part of the description* of the goods within the meaning of the judgment in *Randall v. Newson* (*m*), but only as an expression of the buyer's *motive* in buying. Parke, B., well puts the law in *Chanter v. Hopkins* (*n*) (on which this proviso is founded), when he says:—"I agree with the authority . . . of *Jones v. Bright*, that if an order is given for an *undescribed* and *unascertained* thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price unless it does answer the purpose for which it was supplied. . . . The purchase [here] is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine."

The phrase "specified article" in this sub-section is not meant to be synonymous with "specific article," *i.e.*, meaning "identified and agreed upon" at the time of the contract. See s. 62 (1). The principle has been held to apply to unidentified goods if sufficiently *defined in character* by their patent or trade-name (*o*). See also the Indian Contract Act, s. 115, which refers to an article "of a well-known ascertained kind."

This rule is also in accordance with Scotch (*p*) and American (*q*) law.

(*g*) *Hall v. Burke* (1886), 3 Times L. R. 165.

(*h*) (1829), 5 Bing. 533.

(*i*) (1841), 2 M. & G. 279.

(*k*) (1868), L. R. 3 Q. B. 197.

(*l*) Per Erskine, J., in *Brown v. Edgington* (1841), 2 M. & G. 292.

(*m*) (1877), 2 Q. B. D. 102.

(*n*) (1838), 4 M. & W. 399.

(*o*) *Prideaux v. Bunnett* (1857), 1 C. B. N. S. 613; *Olivant v. Bayley* (1843), 5 Q. B. 288.

(*p*) *Rowan v. Coats & Co.* (1885), 12 Ct. of S. Cas. 395.

(*q*) *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510.

ILLUSTRATIONS.

S. 14 (1).

1. B., a wine merchant, orders of A., a dealer in ropes, a rope for the purpose, as he informs A., of raising casks of wine from his cellar. A. gives an order for the rope to C., a rope-maker, without informing him of B.'s purpose, and C. employs D. to make it. The rope, when used by B., breaks, and B.'s wine is spilt. A. does not know of the insufficiency of the rope. A. is liable to B. for breach of warranty that the rope was fit for the raising of B.'s wine. *Brown v. Edgington* (1841), 2 M. & G. 279 (r).

2. B., a woollen merchant, who is also (but not to A.'s knowledge) a tailor, orders of A., a woollen manufacturer, by sample, piece-dyed indigo blue cloth, which he makes into liveries. A. is not aware that the cloth was ordered for liveries. A.'s liability to B. is to supply cloth reasonably fit as supplied to a woollen merchant, but is not liable on any warranty to supply cloth fit for liveries. *Jones v. Padgett* (1890), 24 Q. B. D. 650.

3. B. buys of A., a carriage builder, a single horse phaeton, and afterwards orders A. to fit a pole and splinter bar to it. While B. is driving, the pole, by reason of a latent defect (of which A. is not cognizant), breaks, and B.'s horses are injured. A. is liable to B. for breach of warranty that the pole should be fit for a two-horse phaeton. *Randall v. Newson* (1877), 2 Q. B. D. 102.

4. A., a calico printer, agrees to sell to B., a dye extract manufacturer, a quantity of spent madder, which is merely the residual product of his manufacture. It is found useless for the purposes of B.'s manufacture. B. must nevertheless pay for it, as it was no commodity in which A. dealt, and B. consequently bought on his own judgment, as he had specified the article he wanted. *Turner v. Mucklow* (1862), 6 L. T. N. S. 690 (s).

5. B. writes to A., the patentee of "Chanter's Smoke-consuming Furnace," "Send me your patent apparatus for fitting up my brewing copper with your smoke-consuming furnace." B. sends a furnace and apparatus accordingly, which is found to be useless for the purposes of a brewery. B. is liable to A. for the price of the goods, as A. sent the specified article ordered under its patent name. *Chanter v. Hopkins* (1838), 4 M. & W. 399.

Goods shall be of merchantable quality.—In a sale of goods by description, when the buyer has not inspected the goods, there is, in addition to the *condition precedent* that the goods shall answer the description, an *implied warranty*(t) that they shall be saleable or merchantable. The rule was first clearly stated by Lord Ellenborough in *Gardiner v. Gray*(u), where the defendant made a sale of twelve bags of waste silk. Lord Ellenborough said: "Under such circumstances the purchaser has a right to expect a *saleable article* answering the description in the contract. Without any particular warranty

S. 14 (2).
Implied
condition of
merchantable
quality.

(r) See also *Macfarlane v. Taylor* (1868), L. R. 1 H. L. Sc. 246.

(s) See also *Ipswich Gas Co. v. King* (1886), 3 Times L. R. 100; *Wilson v. Dunville* (1879), L. R. Ir. 4 Ex. 249.

(t) This was before the Act really a condition. See judgment in *Randall v. Newson* (1877), 2 Q. B. D. 102.

(u) (1815), 4 Camp. 144.

S. 14 (2).

this is an *implied* term in every such contract. *Where there is no opportunity to inspect, the maxim of caveat emptor does not apply.* He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be *saleable in the market* under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill" (x).

"It is . . . well settled that, upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in *Jones v. Just* (y), where all the previous authorities on the point were reviewed" (z).

The condition that the goods should conform to the sample under s. 15 (1) is not inconsistent with the condition of merchantable quality in this sub-section, so far as regards defects not disclosed by the sample (a).

This sub-section contemplates the case of a contract for the sale of goods—

- (1) Of a particular *class* or *kind*.
- (2) In which the seller deals.
- (3) To a buyer without inspection.

All the rules in these sub-sections to s. 14 are based on the one underlying idea that the buyer purchases not on his own, but *on the seller's judgment*. If he defines the goods he requires, within the meaning of the proviso to sub-s. (1), or if he inspects the bulk or a sample of the goods, according to the proviso to this sub-section, or if the seller does not deal in that class of goods, he purchases on his own judgment. On the other hand, when the seller undertakes (in the language of the Court in *Jones v. Just* (y)) to supply goods "manufactured by himself, or in which he deals," and which the buyer has no opportunity of inspecting, the buyer is naturally presumed to be purchasing on the seller's judgment, because (1) he only defines the *class* of goods he requires; and (2) orders them of a seller who, being in the habit of dealing with such class of goods, presumably has the technical knowledge with regard thereto

(x) Benj. pp. 652, 653, where a long list of cases is given in note (t), p. 653.

(y) (1868), L. R. 3 Q. B. 197.

(z) Per Lord Herschell, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 291.

(a) See s. 15 (2) (c), *post*, p. 105.

which the buyer lacks. Upon an order, *e.g.*, for goods, described as "coatings," "the merchant trusts to the skill of the manufacturer, and is entitled to trust to it" (c); the buyer "has a right to presume that the manufacturer understands his own business, and will use such methods as may be proper to produce a good article of the kind ordered" (d). *Turner v. Mucklow* (e) was a case where the seller did not deal in the class of goods ordered.

S. 14 (2).

Implied condition . . . of merchantable quality.—"Quality" is defined, in s. 62 (1), as including "state or condition."

Previously to the Act, an attempt was made, in *Gower v. Van Dedalzen* (f), to extend the implied condition to the package or receptacle in which the goods were contained, in the particular case, to the casks in which oil was sold; but the buyer's plea, that the casks were not good merchantable casks, was held bad, there being no proof that the oil was in any way injured. It is presumed that, if the goods are injured by reason of the defective receptacle, the goods would not be in a "merchantable state or condition" within the meaning of s. 62 (1).

See, also, with regard to these words, the judgments of the law Lords in *Drummond v. Van Ingen* (g) as to what constitutes a "defect" in quality.

It will thus be seen that the only implied warranty or condition as to *quality* imposed upon a seller (apart from conformity to sample under s. 15) is that the goods shall be merchantable. There is no implied warranty as to any *particular* quality. "There is no contract," says Brett, L.J. (h), "that [the goods] shall be equal to the ordinary make of the manufacturer himself, or equal to the ordinary make of any other manufacturer, or to the ordinary make of all manufacturers of similar goods." And, *a fortiori*, there is no condition implied that the goods supplied shall be of the best possible quality (i).

When the goods are to be supplied to the buyer at a distant place, the merchantableness or fitness of the goods may be affected by the transit. In this case the question arises whether the seller has fulfilled the condition. The cases bearing upon the question are quoted in the note (k). The general rule deducible

Rule, when goods supplied to buyer at a distance.

(c) Per Lord Herschell, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 293.

(d) Per Lord Selborne, *ibid.* at p. 288.

(e) (1862), 8 Jur. N. S. 870. See the facts stated on p. 99.

(f) (1837), 3 B. N. C. 717.

G.

(g) (1887), 12 Ap. Ca. at pp. 287, 292, 296.

(h) *Johnson v. Rayton* (1881), 7 Q. B. D. at p. 452.

(i) *Harris v. Waite*, 31 Am. R. 694; *Swett v. Shumway*, 102 Mass. 365.

(k) *Bull v. Robison* (1854), 10 Ex.

H

S. 14 (2).

therefrom is that the condition extends to such a reasonable time as is required for the goods to reach the buyer, and until he has a reasonable opportunity of dealing with them in the way of business. The limitations to the rule are (1) that if the deterioration is the *necessary* result of the transit, the condition will not be extended to cover such necessary depreciation, as the condition must be construed reasonably (*l*). The law is so stated also in s. 33, *infra*, with regard to a seller who expressly takes the risk; and, *a fortiori*, would be so if he merely contracted to dispatch the goods. (2) If the deterioration is caused by *exceptional* or *accidental* causes during the transit, the loss will fall upon the owner of the goods, or the person who took the risk of the transit.

The two principal cases are *Bull v. Robison* and *Beer v. Walker*. These are discussed in the notes to s. 20, *post*, p. 202.

Implied
condition
excluded by
buyer's
examination.

Provided, etc.—Lord Ellenborough says, in the extract quoted *ante*, p. 96, that “where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply.” This has been also laid down in a number of cases, particularly in the leading case of *Jones v. Just* (*m*), where all the rules as to implied warranties were reviewed. If the buyer has inspected the goods, then the general rule, stated in the first clause of this section, applies, and the cases quoted as illustrative of that rule, subject to this limitation, viz., that the examination be capable of being a *real* examination. On this question, the following extracts from the judgments in *Drummond v. Van Ingen* (*n*) are instructive. In that case the sale was by sample, but the principle applies generally (*o*):—“If [the defect in quality] was known to the respondents when they gave the order, or if (as between themselves and the appellants) they ought to be taken as having discovered, or as having had means, which they ought to have used, of discovering it from the samples, I should hold . . . that there was no implied warranty against it. But if it was a latent defect, of which knowledge, or means of knowledge, which ought to have been used, could not properly, under the circumstances, be imputed to the respondents, then I think that the word ‘quality’ . . . ought to be restricted to those qualities which were patent, or discoverable from such examination and inspection of the

342; 2 C. L. R. 1276 (best report);
Beer v. Walker (1877), 46 L. J. C. P.
677; *Ullock v. Roddelein* (1828), *Dans.*
& *Ll.* 6; *Walker v. Langdale's Chem.*
Manure Co. (1873), 11 Ct. of S. Cas.
(3rd ser.) 906.

(*l*) Per Alderson, B., in *Bull v.*
Robison (1854), 2 C. L. R. at p. 1278.

(*m*) (1868), L. R. 3 Q. B. 197.

(*n*) (1887), 12 Ap. Ca. 284.

(*o*) See per Lords Herschell and
Macnaghten, *ibid.* at pp. 294, 299.

samples as, under the circumstances, the respondents might reasonably be expected to make" (p). And Lord Herschell says (q): "There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience."

S. 14 (2).

See further on this point, the notes to s. 15 (2) (c), *post*, p. 105.

ILLUSTRATIONS.

1. A. agrees to sell to B. certain "bales of Manilla hemp," expected to arrive by a particular ship. Upon delivery the hemp is found to have been wetted by sea-water and afterwards dried. A. was not aware of these facts. The character of the hemp, as Manilla hemp, is not thereby destroyed, but it is unmerchantable as Manilla hemp. A. is liable to B. on a warranty that the hemp should be merchantable Manilla hemp. *Jones v. Just* (1868), L. R. 3 Q. B. 197.

2. A. agrees to sell to B. 240 casks of good merchantable Gallipoli oil. The oil, on tender to B., is contained in badly-seasoned casks. B. must accept and pay for the oil, unless [seem] the defective condition of the casks destroys the "merchantable state or condition" of the oil. *Gower v. Van Dedalzen* (1837), 3 B. N. C. 717.

3. A., a wholesale provision dealer in London, contracts to supply B., a retail dealer at Brighton, with a quantity of Ostend rabbits. The rabbits, when delivered to the railway, are sound, but, on arrival, are unmerchantable. A. cannot recover the price of the rabbits from B., as the condition of merchantable quality extended to the time when B. could deal with the rabbits in the ordinary way of his business. *Beer v. Walker* (1877), 25 W. B. 880.

4. B., in Liverpool, orders of A., in Staffordshire, a quantity of iron to be delivered at A.'s risk at Liverpool. A. delivers the iron in merchantable condition to a carrier. On arrival, the iron is rusted; but the rusting is, to the knowledge of A. and B., necessarily incident to the transit. B. must accept the iron, as A. has fulfilled the condition. *Bull v. Robison* (1854), 10 Ex. 342 (r).

5. A., a calico printer, sells to B., a dye extract manufacturer, a boat-load of spent madder, being merely the refuse of A.'s processes of manufacture, and which lies on A.'s premises open to B.'s inspection. The madder is found useless by B. A. is not liable to B. on a warranty of quality, as (1) A. did not manufacture the madder for sale, and therefore did not deal in such goods; (2) B. might have inspected it if he had chosen, and not having done so, bought on his own judgment. *Turner v. Mucklow* (1862), 8 Jur. N. S. 870 (s).

6. B., a shipowner, buys of A., after inspection, a quantity of copper for sheathing a ship, and pays A. the price. The copper, instead of lasting several years, corrodes in a few months, by reason of some intrinsic defect in the manufacture, but A. is ignorant of this. B. may recover damages against A. for the unmerchantableness of the copper, as his inspection could not reveal the defect. *Jones v. Bright* (1829), 5 Bing. 533 (t).

(p) Per Lord Selborne, *ibid.* at pp. 287, 288.

(q) *Ibid.* p. 294.

(r) See s. 33.

(s) This case was explained by Mellor, J., in *Jones v. Just*, *supra*, on the second ground. Submitted,

however, that (as appears from the judgments in the case) the real ground was the first.

(t) See remarks of Lord Macnaghten on this case in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 299.

S. 14 (3).

Implied condition annexed by usage of trade.—This sub-section is based upon the case of *Jones v. Bowden*, quoted in illustration. See also *Syers v. Jonas* (u), and *Weall v. King* (x). It will be observed that the buyer inspected the sample of the pimento, which did not disclose the defect; and the case is, accordingly, quite in accordance with the principle stated in the proviso to the preceding sub-section.

ILLUSTRATION.

A. sells to B. by auction a quantity of sea-damaged pimento, without stating it to be such. B. examines fair samples of the bulk, which show the goods to be of inferior quality, but not showing they were sea-damaged. There is a trade usage to state this fact if it exists. There is a warranty by A. that the pimento is not sea-damaged. *Jones v. Bowden* (1813), 4 Taunt. 847.

S. 14 (4).
Effect of
express con-
dition in
excluding
implication.

Express condition does not negative implied, etc.—This sub-section adopts the law of *Bigge v. Parkinson* (y).

The maxims of the common law are *modus et conventio vincunt legem*, and *expressum facit cessare tacitum*; i.e., if the express agreement of the parties is inconsistent with the term implied by the law the latter must give place. This sub-section states merely a particular instance of that general principle which is again referred to in the notes to s. 55. The Court will not “by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty. So with respect to any other kind of warranty: the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down—which would be manifestly inconsistent” (z).

Subject to the above limitation, there is no reason why the buyer may not bargain for goods of various qualities, each guaranteed by an express condition by the seller. “The doctrine that an express provision excludes implication,” says Willes, J. (a), “does not affect cases in which the express provision appears on the true construction of the contract to

(u) (1848), 2 Ex. 111.

(x) (1810), 12 East, 462, quoted in *Jones v. Bowden*, *supra*.

(y) (1862), 7 H. & N. 955.

(z) Per Maule, J., in *Dickson v. Zisania* (1851), 10 C. B. at p. 610.(a) *Mody v. Gregson* (1868), L. R. 4 Ex. at p. 53.

have been *superadded* for the benefit of the buyer," where in fact there is "an independent and additional undertaking" by the seller (b). Thus, *e.g.*, an express warranty that the goods are according to sample would not be inconsistent with the implied condition as to merchantable quality if the sample was *deceptive*, as in *Mody v. Gregson* (c). The express intention that the goods should conform to the sample is not inconsistent with the implied intention that they should be merchantable, *where the sample represented a merchantable article*; it would be otherwise if the sample *truly* represented the particular quality of the bulk (c). On the other hand, where the parties have *agreed upon a particular standard* by which the quality is to be gauged, any implied warranty of quality or fitness would ordinarily be negatived, as where they contract for goods of a particular description and quality, "*as classified by official surveyors*" (d), or for goods "*of the same quality as the seller made*" for other persons (e). In both these cases the express warranty would negative the implied.

S. 14 (4).

ILLUSTRATIONS.

1. A., in answer to B.'s request for tenders for stores for troops which B. had contracted to convey to India, offers to supply B. with troop stores, guaranteed to pass the survey of the Honourable East India Company's officers. A. delivers the stores, which pass the survey, but are unsound. A. is liable to B. for a breach of warranty that the stores should be fit as troop stores, although the express warranty was satisfied, the two not being inconsistent. *Bigge v. Parkinson* (1862), 7 H. & N. 955.

2. A. agrees to sell B. a cargo of Indian corn, which he expressly warrants to be equal to the average of the shipments of that season, and should be shipped in good and merchantable condition. The corn is bought, to the knowledge of A., for a foreign voyage. A. has not warranted that the corn was fit for a foreign voyage, as his express warranty related only to the quality on shipment. *Dickson v. Zizania* (1851), 10 C. B. 602.

3. B., a cloth merchant, orders of A., a cloth manufacturer, for the purpose (as A. knows) of re-selling to tailors, a quantity of worsted coatings. The goods are to be in quality and weight equal to samples previously furnished. The samples and the goods supplied contain a latent defect which renders them unfit as coatings and unmerchantable. A.'s express warranty, that the goods should be equal to sample, is not inconsistent (so far as latent defects are concerned) with the implied condition that the goods should be merchantable and fit. *Drummond v. Van Ingen* (1887), 12 App. Cas. 284.

4. A. agrees to sell to B. "bright fresh spruce deals averaging second quality, as classified by official surveyors." A. delivers deals of that description and quality as classified. A. has fulfilled the condition, though the goods may be unmerchantable to B. *McLelland v. Stewart* (1883), 12 L. R. Ir. 125.

(b) Per Brett, L.J., in *Johnson v. Baylton* (1881), 7 Q. B. D. at p. 451.

(c) (1868), L. R. 4 Ex. 49.

(d) *McLelland v. Stewart* (1883), 12 L. R. Ir. 125.

(e) *Dewitt v. Berry*, 134 U. S. 306.

Sale by Sample.

S. 15.
Sale by
sample.

15.—(1.) A contract of sale is a contract for sale by sample, where there is a term in the contract, express or implied, to that effect.

S. 15 (1).

"A sale *by sample*, properly so called, is merely a particular case of a sale *by description*. The goods are impliedly described as being of a homogeneous bulk, out of which the sample has been drawn, and the quality of which is therefore represented by the sample" (e).

But the sample must be a sample of *that which the buyer agreed to buy* (f), i.e., the condition as to the *description* of the goods must *first* be satisfied. See s. 13, *ante*, p. 88.

Sometimes goods are contracted to be sold according to an "average sample." For the meaning of this, see the American cases cited in the note (g).

A term . . . to that effect.—"It must not be assumed that, in all cases where a sample is exhibited, the sale is a sale 'by sample.' The vendor may show the sample, but decline to sell by it, and require the purchaser to examine the bulk at his own risk; or the buyer may decline to trust to the sample and the implied warranty, and require an express warranty, in which case there is no implied warranty, for *expressum facit cessare tacitum*" (h).

"This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity (i).

ILLUSTRATION.

A. exhibits to B. a sample of Sassafras wood, which B. inspects, and A. then agrees to sell the wood to B., described in the sale note as "fair merchantable Sassafras wood." This is a sale on an express condition or warranty that the wood shall be as described, and not a sale by sample, the sale note being silent as to any sample. *Tye v. Finmore* (1813), 3 Camp. 462 (k).

(e) Campb. on Sale of Goods (1st ed.), p. 305.

(f) *Nichol v. Godts* (1854), 10 Ex. 191.

(g) *Leonard v. Fowler* (1871), 44 N. Y. 289; *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

(h) Benj. p. 641. See per May,

C.J., in *McMullen v. Helberg* (1879), 4 L. R. Ir. at p. 121.

(i) Per Lord Ellenborough, in *Gardiner v. Gray* (1815), 4 Camp. at p. 144.

(k) See also *Mayer v. Evert* (1814), 4 Camp. 22; *Gardiner v. Gray* (1815), *ib.* p. 144.

(2.) In the case of a contract for sale by sample— S. 15 (2).

- (a) There is an implied condition that the bulk shall correspond with the sample in quality:
- (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
- (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Bulk shall correspond with sample.—Sub-s. (2) (a) must be read subject to s. 13, *supra*. S. 15 (2) (a).

“The sale by sample . . . is a contract to sell a quantity of goods answering to the sample” (l). And “the purchaser may reject the commodity if it does not correspond with the sample” (m). Implied condition that bulk corresponds with sample in quality:

“If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity. This is not a performance of the contract” (n).

The above extracts show clearly that, by the previous law, the *warranty* of accordance with sample was really a condition, as it is now expressly stated to be.

It will be observed that the only condition implied in this clause is that the goods should conform to the sample in *quality*, which includes, by s. 62 (1), “state or condition.” The use of a sample usually negatives the implication that the goods should be of any *particular* quality (o), and naturally so, as “the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract” (p); and they are presumed to be contracting for goods of a quality only similar to the sample. This rule is quite consistent with the rule laid down in s. 13, that the goods should also conform to their description, as the sample must be a sample not only of the *quality* of the goods contracted

(l) Per Cur. in *Hill v. Smith* (1812), 114.
4 Taunt. at p. 532.

(m) Per Abbott, C.J., in *Parker v. Palmer* (1821), 4 B. & A. at p. 392.

(n) Per Lord Ellenborough, in *Hibbert v. Shce* (1807), 1 Camp. at p.

(o) Per Cur. in *Mody v. Gregson* (1868), L. R. 4 Ex. 49.

(p) Per Lord Maonaghten, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 297.

S. 15 (2) (a). for, but must be a sample of the goods contracted for, and not of something else (q).

In some cases the sample will be the *only description* of the goods contracted for, *e.g.*, when the seller sells by sample a white mineral of which he had found a vein, and does not know what it is (r); or a seed which he cannot identify (s). In such cases conformity of the bulk with the sample satisfies not only the condition as to quality under this sub-section, but also that of description under s. 13. The case is otherwise when the sale is of goods *generally known in commerce* according to sample. Here the buyer has not, as he has in the case above, information of the character of the bulk, and the latter must be merchantable (r). This is dealt with in sub-s. 2 (c), *infra*.

A mistake by the seller in exhibiting the *wrong sample* is no ground for avoiding the sale (t), as the seller is, "by his own fault, precluded from setting up that he had entered into [the contract] in a different sense to that in which it was understood by the other party" (u).

ILLUSTRATIONS.

1. A. agrees to sell to B. seventeen pockets of hops according to sample, to be paid for by a bill of exchange. B. draws a bill and indorses it to A. A. delivers hops which are not in accordance with sample, which B. refuses to accept. A. cannot sue B. on the bill, as the consideration for the bill has wholly failed. *Wells v. Hopkins* (1839), 5 M. & W. 7.

2. A. agrees to sell to B., by sample, a seed which A. calls "seed barley," but does not bind himself as to its exact character. The bulk delivered by A. corresponds to the sample, but is not seed barley. A. has fulfilled the condition of the contract. *Carter v. Crick* (1859), 4 H. & N. 412.

3. B. buys of A. at a public sale, by sample, sixteen hogsheads of sugar. The sugar, when delivered, is not according to sample, and B. rejects it. A. cannot recover the price of the sugar from B. *Hibbert v. Shee* (1807), 1 Camp. 113.

S. 15 (2) (b).
and that
buyer shall
have reason-
able oppor-
tunity of
comparing
the bulk:

Opportunity of comparing the bulk with the sample.—This clause is founded on the case of *Lorymer v. Smith*, quoted in illustration (x).

As the buyer has a right of rejection if the bulk of the goods delivered do not agree with the sample, he has also a right to a

(q) *Nichol v. Godts* (1854), 10 Ex. 191; see under s. 13, *ante*, p. 88.

(r) Per Cur., in *Mody v. Gregson* (1868), L. R. 4 Ex. 49.

(s) *Carter v. Crick* (1859), 4 H. & N. 412.

(t) *Scott v. Littledale* (1858), 8 E. & B. 815; see Benj. p. 63.

(u) Per Hannen, J., in *Smith v. Hughes* (1871), L. R. 6 Q. B. at p. 609.

(x) Cf. with that case, *Pettitt v. Mitchell* (1842), 4 M. & G. 819, which was an express contract, and held under the circumstances that the buyer had no right to measure the goods.

reasonable opportunity of doing that which is necessary to enable him to make up his mind, *i.e.*, to inspect the goods. S. 34 (1), *infra*, provides that, under these circumstances, the buyer is not deemed to have accepted the goods. *Lorymer v. Smith* shows that the buyer may, on an improper refusal to allow inspection, repudiate the contract *in toto*, *i.e.*, even as regards another parcel of goods of which he *had* been allowed inspection. S. 15 (2) (b).

A reasonable opportunity.—In *Lorymer v. Smith*, *infra*, the Court found that the buyer's request for inspection was made "at a proper and convenient time." It would therefore follow that a request at an improper time, or otherwise an unreasonable request, unaccommodated by the seller, would be no breach of the condition.

ILLUSTRATION.

A. agrees to sell to B., by sample, two parcels of wheat, to be paid for by bill if required. B. calls at a reasonable hour at A.'s premises, and examines one parcel, but is prevented by A. from seeing the other. B. never tenders the bill. B. then repudiates the whole contract. A. afterwards offers inspection. B. is not liable to accept or pay for any of the wheat. *Lorymer v. Smith* (1822), 1 B. & C. 1.

Goods shall be free from any defect not apparent, etc.—S. 15 (2) (c). Sub-s. 2 (a), above, deals with the condition that goods, bought by sample, should conform therewith. In such a case as has been pointed out, any other condition as to quality is *primâ facie* negatived. The buyer has, by his inspection of the sample, the quality of the bulk before him, and is presumed to be contracting for goods only equal in quality thereto. But "as the object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express . . . it seems difficult . . . to ascribe any greater effect to a sample in excluding implication than would be ascribed to express words in the contract, giving, so far as words could give, the same amount of information" (y); "the sample cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence" (z).

Therefore, in accordance with the above principles, if the sample be deceptive, *i.e.*, represents untruly the good commercial article about which the parties are contracting, any *primâ facie* implication that the parties are dealing with a bulk only according to sample is negatived; just in the same way as

and that goods are free from latent defects causing unmerchantableness.

(y) Per Willes, J., in *Mody v. Gregson* (1868), L. R. 4 Ex. at p. 53, quoted in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at p. 294.
(z) Per Lord Macnaghten, in *Drummond v. Van Ingen*, *ibid.* at p. 297.

S. 15 (2) (c).

if the apparent qualities of the sample had been enumerated in express words, instead of being left to implication. The position of the seller and buyer in fact is just this: they are dealing with the bulk of a commodity to be supplied according to the sample, if the latter truly represents (but not otherwise) the commodity about which the parties are contracting. This commodity will be (in the cases of mercantile goods) such goods as ordinarily understood in commerce, saleable and merchantable (a), or (as the case may be) fit for the purpose for which they were ordered (b). In the case of non-mercantile goods, the subject-matter of the contract will be merely a bulk corresponding to the sample, though not merchantable (c), as the seller does not "deal in goods of that description" (d).

The above provisions of the previous law are embodied in this sub-section, which is founded principally on the great case of *Drummond v. Van Ingen*, quoted *supra*. In that case (which was one of a manufactured article, but the principle applies also to a dealer (d)), the law Lords make the following instructive remarks:—

"When a manufacturer proposes to carry out the ideas of his customer, and furnishes a sample to show what he can do, surely in effect he says, 'This is the sort of thing you want, the rest is my business; you may depend upon it that there is no defect in the manufacture which would prevent goods made according to that sample from answering the purposes for which they are required. As against the manufacturer, I think it must be taken that the sample is free from all hidden defects of manufacture which would interfere with the proper use of the manufactured article. If the manufacturer supplies goods corresponding with the sample, but free from all such defects, he fulfils his bargain' (e).

"When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied *representing a manufactured article which will be fit* for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods

(a) See s. 14 (2), *ante*, p. 95.(b) See s. 14 (1), *ante*, p. 92.(c) *Turner v. Mucklow* (1862), 8 Jur. N. S. 870, was an instance, though not a sale by sample. Seeon this case, *ante*, pp. 97, 99.(d) See s. 14 (2), *ante*, p. 90.(e) Per Lord Macnaghten, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. 297, 298.

supplied on an order without samples complying with such a warranty" (f). S. 15 (2) (c).

It will be seen from the above two extracts from the judgment of the law Lords that the sample may be regarded under two aspects, viz.: (1) as showing a common intention that the quality of the bulk shall be judged of by the sample, so far only as the sample is capable of revealing that quality: (2) as a representation or engagement on the part of the seller that the sample shall truly represent a merchantable article. In the latter case the seller would be bound, by a kind of estoppel, from saying that the bulk, though according to sample, was also according to contract. In the former, the presumed common intention is that a merchantable article shall be represented by the sample.

Defect rendering them unmerchantable.—That is, in the case of a contract for a mercantile commodity. If the goods contracted for by sample are not such, it would seem to follow, from the principle of *Turner v. Mucklow* (g) (though that was not a case of a sale by sample), that the only condition implied would be that laid down in sub-s. 2 (a); i. e., that the bulk should be in accordance with the sample.

Apparent on reasonable examination.—That is, on an examination by "a buyer of ordinary diligence and experience" (h). "What is 'due diligence' must depend upon the circumstances" (h). The question is, what the sample "would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way business is done in this country" (i).

ILLUSTRATIONS.

1. B., a cloth merchant, orders of A., a cloth manufacturer, worsted coatings, to be in quality and weight equal to previous samples. The samples and also the bulk supplied contain a latent defect, i. e., a want of firmness or cohesion, not discoverable by a reasonable examination of the samples. B. resells the goods, which are returned on his hands

(f) Per Lord Herschell, *ibid.*, p. 294.

(g) (1862), 8 Jur. N. S. 870. The facts are stated on p. 99, *ante*. See also *Wilson v. Dumeville* (1879), L. R. Ir. 4 Ex. 249.

(h) Per Lord Herschell, in *Drummond v. Van Ingen* (1887), 12 Ap. Ca. at pp. 294, 295.

(i) Per Lord Macnaghten, *ibid.*, at p. 297.

S. 15 (2) (c).

by the buyers. A., although the bulk corresponded with the samples, is liable to B. on a warranty that the coatings did not contain this defect rendering the goods unmerchantable. *Drummond v. Van Ingen* (1887), 12 App. Ca. 284.

2. A., a manufacturer, agrees to sell to B., according to sample, certain grey shirtings of a certain weight. Both the sample and the bulk contain an admixture of 15 per cent. of china clay, introduced by A. only to increase the weight, but rendering the goods unmerchantable. This admixture is not discoverable by an ordinary inspection. B. inspects and accepts the goods. A. is liable to B. on a warranty of merchantable quality. *Mody v. Gregson* (1868), L. R. 4 Ex. 49.

Rules as to warranties.

Before leaving the subject of warranty and condition, the present is a good opportunity of noticing some points in connection with the subject of warranty. The distinction between conditions, warranties, and mere representations is dealt with above (k).

Warranty is defined in s. 62 (1) as "an agreement with reference to goods, &c.," i.e., it must form part of the contract. "It is not, indeed, necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it" (l). Thus, in *Hopkins v. Tanqueray* (m), the seller before the sale had affirmed the soundness of a horse, and the buyer had, on the following day, bought the animal, *without warranty*, at auction. It was held that the antecedent representation was no part of the sale by auction; and consequently no warranty. "It also follows . . . that a warranty given after a sale has been made is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given" (n).

Another rule with respect to a warranty is that no special form of words is necessary. "An affirmation at the time of sale is a warranty, provided it appear in evidence to have been so intended" (o). "And in determining whether it was so intended,

(k) See notes to s. 11 (1), *ante*, p. 70.

(l) Benj. pp. 607, 608. So also in the early case of *Chandeler v. Lopus* (1604), Cro. Jac. 4; 1 Sm. L. C. (9th ed.) 186, "the warranty ought to be made at the same time of the sale." See also *Cowdy v. Thomas* (1877), 36 L. T. N. S. 22.

(m) (1854), 15 C. B. 130; cf. *Percival v. Oldacre* (1865), 18 C. B. N. S. 398.

(n) Benj. p. 608, quoting *Roscorla v. Thomas* (1842), 3 Q. B. 234. See also the old case of *Mew v. Russell* (1683), 1 Show. 529.

(o) Per Buller, J., in *Pasley v. Freeman* (1789), 3 T. R. 51, quoting

a decisive test is whether the seller assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and in which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter not" (*p*).

The intention is one of fact for the jury (*q*). "And in some cases, even when the alleged warranty was expressed in writing, it has been left to the jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty or not; for *simplex commendatio non obligat*" (*r*).

Secondly, with regard to warranties in general terms. The general rule as to these is, that they do not *prima facie* extend to defects (1) of which the buyer was aware; (2) which were easily discoverable without the exercise of peculiar skill; but they may so extend by express agreement (*s*). But the general warranty extends to all other defects (*t*). So in America, it has been decided (*u*) that a general warranty extends to patent defects, where access to the horse was prevented by the seller by means of a trick, the buyer being unaware of the defect. This is quite in accordance with principle.

Thirdly, with regard to warranties limited in time. A seller may warrant a future, as he may a present, event (*x*); thus a warranty limited to *continue* a certain time may be (*y*) a warranty of a future event, or only a warranty against such defects as are pointed out during that time (*z*). And the limitation of the time may be proved by rules or notices affixed conspicuously on the seller's premises (*a*). It has been decided in America (and the decision is quite according to principle) that the mention of the time applies only to the warranty, and does not operate to extend, in the buyer's interest, the time

General warranties.

Warranties limited in time.

Holt, C.J., in *Cross v. Gardner* (1688), 1 Show. 68; and *Medina v. Stoughton* (1700), 1 Raym. 593. See also 2 Sm. L. C. (9th ed.) 74.

(*p*) Benj. pp. 609, 610, quoting (*inter alia*) Buller, J., in *Pasley v. Freeman*, *supra*.

(*q*) Benj. p. 610.

(*r*) *Ibid*.

(*s*) Benj. p. 613.

(*t*) *Bailey v. Merrell* (1605), 3 Bulstr. 94; *Holliday v. Morgan* (1858), 1 E. & E. 1.

(*u*) *Kenner v. Harding*, 28 Am. R. 615.

(*x*) Per Lord Mansfield, in *Eden v. Parkinson* (1781), 2 Dougl. at p. 734.

(*y*) Per Lush, J., in *Chapman v. Gwyther*, *infra*; *Snow v. Shoemaker Man. Co.*, 44 Am. R. 509.

(*z*) *Chapman v. Gwyther* (1866), L. R. 1 Q. B. 463; *Bywater v. Richardson* (1834), 1 A. & E. 508; *Smart v. Hyde* (1841), 8 M. & W. 723.

(*a*) *Watkins v. Rymill* (1883), 10 Q. B. D. 178.

for rejection, under s. 35, of the goods after discovery of the defect (b).

ILLUSTRATIONS [Warranty or not].

1. A. sells to B. a horse for 10*l.*, and gives him a receipt as follows: "Received 10*l.* for a grey four year colt, warranted sound in every respect." This is a warranty only of soundness, as appears by the collocation of the words, and not of age, which is merely *represented* by A. *Budd v. Fairmaner* (1831), 8 Bing. 48 (c).

2. A. sells to B. by a bill of parcels "four pictures, Views in Venice, Canaletti." It is a question for the jury whether A. merely expressed his opinion as to the authorship, or warranted it. *Power v. Barham* (1836), 4 A. & E. 473.

ILLUSTRATIONS [General warranty].

1. A. sells to B. two horses, one of which is known to B. at the time to be suffering from a cough, and the other from a swelled leg; but A. warrants their soundness on delivery at the end of a fortnight. This is an express warranty by A. of the horses' soundness at the time of delivery, notwithstanding the patent defect. *Liddard v. Kain* (1824), 2 Bing. 183.

2. A. sells to B. a horse which, to the knowledge of both, is suffering from a splint, and warrants him then sound. Some splints cause lameness, and others do not; and no inspection could show the particular character of this splint. The horse thereby becomes lame. A. is liable to B. on the warranty, as B. could not tell that the particular splint would cause lameness. *Margetson v. Wright* (1832), 8 Bing. 454.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

Goods must be
ascertained.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

S. 16.

"Where the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement [*i.e.*, 'an agreement to sell']. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by

(b) *Upton Man. Co. v. Huiskis*, 69 Iowa, 557.

(c) See also *Anthony v. Halstead* (1877), 37 L. T. N. S. 433.

the mere contract; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B., and to have become the property of A." (d).

"When the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an 'appropriation' of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass" (e).

In such a case "the contract can be no more than a contract to supply goods answering a particular description. It is clear there can be no intention to transfer the property in any particular lot of goods more than another till it is ascertained which are the very goods sold. . . . It makes no difference, although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not intend to transfer the property in one portion of the stock more than in another" (f). The rule is as old as the Y. B., 18 Edw. 4, 14.

The only English case which conflicts with the above principles is *Whitehouse v. Frost* (g), where, as between the buyer and second buyer, the property was held to pass in an undivided portion of a larger bulk of oil. Le Blanc, J., in *Busk v. Davis* (h), explained the case as one of a sale *specifically of an undivided quantity*, and good at all events as between a buyer and second buyer. But, though the case has been followed in America, it has been much doubted in England (i), and may be considered not to be law.

Unless and until the goods are ascertained.—By the terms of this section the ascertainment of the goods is made a condition, "subject to which," under s. 1 (4), "the property in the goods is to be transferred." "Property" is defined in s. 62 (1) as "general property"; and the words "no property" must be taken as meaning that "the property is not transferred."

There is no express definition in the Act of "ascertainment," but the implied definition of "unconditional appropriation" may be contemplated by s. 18, Rule 5 (1). If such be the intended definition, ascertainment does not take place till all the conditions to the transfer of the property are fulfilled, whatever may

Meaning of
ascertain-
ment.

(d) Benj. p. 274.

(e) Benj. p. 311.

(f) Blackb. p. 125.

(g) (1810), 12 East, 614.

(h) (1814), 2 M. & S. 397.

(i) See the cases in Benj. p. 314.

S. 16.

be the interval between the fixing of the "identity and individuality of the goods" (which was the definition of "ascertainment" previously to the Act)(*k*), and the performance of such conditions, which interval may, as in the case of a shipment and reservation of the right of disposal under s. 19 (1), amount to months. The previous rule was that ascertainment took place by means of an appropriation mutually assented to (*l*); but that the seller might still impose further conditions to the transfer of the property(*m*). It seems a strange result that the goods should not be considered ascertained, however much their identity and individuality was fixed, until every condition precedent to the passing of the property is performed. A way, however, of harmonising the sections with the previous law (as it is probable that no change is intended) is to treat "ascertainment" as undefined, but preserved, as a common law rule, by s. 61 (2), and meaning "a final appropriation," though that appropriation may be clogged with further conditions precedent to the passing of the property.

The question after all is not very material, as the real question in the cases is the transfer of the property, and that is dealt with by ss. 18, Rule 5 (1), and 19 (1).

It is doubtful whether goods, when "ascertained," are dealt with in s. 17, or whether that section is concerned only with specific goods. See the notes to s. 17, *post*, p. 115.

When the subject-matter of the contract of sale is a chattel to be manufactured(*n*), or an entire quantity of goods to be supplied, as, *e.g.*, a cargo (when "cargo" bears that meaning)(*o*), the goods are not ascertained till the completion of the chattel or of the loading and appropriation. These cases are, however, treated of as "future" goods, and dealt with in s. 18, Rule 5 (1), *post*, p. 130 (*p*). And the case of a chattel *to be made* must be distinguished from the case when the chattel is *specific*, though incomplete. The latter case falls under s. 18, Rule 2, *post*, p. 119 (*q*).

(*k*) See per Lord Ellenborough, in *Busk v. Davis* (1814), 2 M. & S. at p. 403.

(*l*) See per Erle, C.J., in *Campbell v. Mersey Docks* (1863), 14 C. B. N. S. 412.

(*m*) The various senses in which "appropriation" is used, and the distinction between it and the transfer of the property, are stated by

Parke, B., in *Wait v. Baker* (1848), 2 Ex. 1.

(*n*) *Mucklow v. Mangles* (1808), 1 Taunt. 318; *Elliott v. Pybus* (1834), 10 Bing. 512.

(*o*) As in *Anderson v. Morice* (1876), 1 Ap. Ca. 713.

(*p*) See also Benj. pp. 287, 288, 342.

(*q*) Benj. pp. 293 *et seq.*

ILLUSTRATIONS.

S. 16.

1. A. contracts to sell B. twenty tons of oil from A.'s cisterns, which contain more than twenty tons. A. does nothing to separate the oil. The oil contracted for has not become the property of B., as there is no ascertainment of any specific portion of the bulk. *White v. Wilks* (1813), 5 Taunt. 176 (r).

2. A. contracts to sell B. ten tons of hemp out of a bulk of thirty tons then lying on the premises of C. A. gives C. an order to weigh the hemp and deliver to B. This is not done, and, B. then becoming insolvent, A. countermands the order to C. A. can maintain trover against C. if he refuses to deliver the hemp to A., as the property in the hemp is not B.'s. *Shepley v. Davis* (1814), 5 Taunt. 617 (r).

3. B. orders of A. twenty hogsheads of sugar. A. fills up and delivers four hogsheads, and then fills up the remaining sixteen and asks B. to take them, which B. promises to do. All the twenty hogsheads are ascertained, as there was a separation by A., and a mutual appropriation. *Rohde v. Thwaites* (1826), 6 B. & C. 388.

4. A. agrees to sell to B. 100 quarters of barley out of the bulk in A.'s granary, B. to send sacks and A. to fill them. B. sends 200 sacks, and A. fills 155. The barley in the 155 sacks is ascertained on the filling of the sacks by A., that being an act of appropriation by A. with B.'s previous authority. For the same reason, there is no ascertainment of the rest of the barley. *Aldridge v. Johnson* (1857), 7 E. & B. 885 (s).

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Property passes when intended to pass.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

“When there has been no manifestation of intention [i.e., as to the transfer of the property], the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery (t); but that the contract is only executory when the goods have not been specified (u), or if, when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape (x), or to ascertain the price (y). In the former case there is no reason for

S. 17 (1).

(r) Other cases are *Wallace v. Breeds* (1811), 13 East, 522; *Busk v. Davis* (1814), 2 M. & S. 397; *Austen v. Craven* (1812), 4 Taunt. 644; *Gabarron v. Kreeft* (1867), L. R. 10 Ex. 274.

(s) Approved, per Lord O'Hagan, in *Anderson v. Morice* (1876), 1 Ap. Ca. at p. 740.

(t) s. 18, r. 1, *post*, p. 117.

(u) s. 16, *ante*, p. 110.

(x) s. 18, r. 2, *post*, p. 119.

(y) s. 18, r. 3, *post*, p. 124.

S. 17 (1).

Transfer of property may depend upon fulfilment of a condition by buyer.

(1) *E. g.*, sale for ready money.

imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done as a condition precedent. Of course, these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the seller's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound or per bushel" (z).

The present appears to be the most appropriate occasion to cite a third rule, as to the passing of the property, mentioned by Mr. Benjamin (a), as follows:—"When the buyer is by the contract bound to anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." The latter clause must, however, it is apprehended, be subject to this limitation, viz., that the delivery does not operate as a *waiver of the condition, e. g.*, of payment on delivery (b).

Thus the facts of the case may show, *e. g.*, that the contract of sale of the specific goods was a ready-money bargain, *i. e.*, a contemporaneous exchange of goods and money (c). In this case no property passes except there be payment on delivery. Sales by a tradesman are ordinarily presumed to be such (d).

There is very little authority on this branch of the law in England (e). But the rule appears to be recognized in s. 19 (1) by the statement that, on a contract for the sale of specific goods, the seller may reserve the right of disposal.

(z) Benj. p. 275. See also the judgment in *Calcutta, &c. Co. v. De Mattos* (1863), 32 L. J. Q. B. at p. 328.

(a) pp. 282, 304.

(b) As in *Harcell v. Hunt*, cited in *Tooke v. Hollingworth* (1793), 5 T. R. 215; *Payne v. Shadbolt* (1808), 1 Camp. 427.

(c) See Noy's *Maxims*, p. 87, and *Bussey v. Barnett* (1842), 9 M. & W.

312; *Cohen v. Foster* (1892), 61 L. J. Q. B. 643.

(d) *Bussey v. Barnett*, *supra*; *Harcwell v. Hunt*, *supra*; and case cited in 1 Sm. L. C. (9th ed.) p. 166.

(e) See *Loeschman v. Williams* (1815), 4 Camp. 181; *Payne v. Shadbolt*, *supra*; and cases in note (c). And in America, *Upton v. Sturbridge Mills*, 111 Mass. 446.

Another class of cases are hire-purchase agreements, where the property does not pass till all the instalments are paid (*f*). So, also, cases of goods sent on approval, &c., under s. 18, Rule 4. But these two classes of cases would seem to be rather bailments, with an option of purchase, the same act of the buyer operating both as an acceptance of the contract, and as a transfer of the property—cases, in fact, of what Mr. Benjamin (*g*) calls “conditional assent.” But they are sufficiently illustrative of the above-quoted rule.

S. 17 (1).
 (2) Hire-purchase agreement.
 (3) Goods sent on approval, &c.

Contract for the sale of specific or ascertained goods.—It is not very clear what the exact meaning of “specific or ascertained” is. The two latter words may be intended to be merely a further definition of “specific,” which is unnecessary, as the term is defined in s. 62 (1) (*h*). In that event s. 17 will apply only to goods “identified and agreed upon at the time of the contract.”

There is this advantage in this interpretation, that thereby a better logical balance of ss. 16 and 17 is preserved; the former dealing only with unascertained goods, and the latter only with specific, and both laying down *general* rules; and s. 18 stating, with regard to both classes, the *particular* rules. If, on the other hand, “or” is to be read as disjunctive, then the word “ascertained” would appear to mean “subsequently ascertained,” and the section then contains the common law rule, as stated by Parke, B., in *Wait v. Baker* (*i*), that, even after ascertainment, the question still remains one of intention as to the passing of the property. But it is possible that “ascertainment” is intended to be defined by s. 18, Rule 5 (1), as “unconditional appropriation.” See on this the notes to s. 16, *ante*, p. 111.

It is noticeable that the same words are found in s. 52, which reproduces s. 2 of the 19 & 20 Vict. c. 97, the word in the original Act being “specific” only. It would seem that under s. 52, at any rate, by the addition of the words “or ascertained,” some extension of the cases to which the section is applicable was intended; and, the same words being used in s. 17 of this Act, it is submitted that “ascertained” is not intended to be synonymous with “specific,” but meant to cover the case of *subsequently* ascertained goods, the “or” being read disjunctively.

For the purpose of ascertaining the intention, &c.—This sub- S. 17 (2).

(*f*) *Ex parte Crawcour* (1878), 9 Ch. D. 419.

(*g*) p. 67.

(*h*) Lord Blackburn speaks of “a specific ascertained article,” and of an article “specific and ascertained.”

See *Seath v. Moore* (1886), 11 Ap. Ca. at p. 370; and see per Sir Creswell Creswell in *Gilmour v. Supple* (1858), 11 Moo. P. C. at p. 566.

(*i*) (1848), 2 Ex. 1.

S. 17 (2).

section appears to include all the facts that can be proved in evidence to show the intention of the parties as to the passing of the property.

Terms of the contract—*e.g.*, a “hire-purchase” agreement, with a stipulation that the property shall pass only on payment of all instalments (*k*).

Conduct of the parties.—This, as Mr. Lely points out (*l*), may mean more than “course of dealing” under s. 55. But it is impossible to say with certainty what its exact meaning is; it may include cases where the seller is estopped by his conduct from denying the transfer of the property (*m*). See also s. 21 (1).

Circumstances of the case—*e.g.*, a sale by a tradesman, from which an intention may be inferred that the goods are to be paid for on delivery (*n*). Other cases will be found in the Illustrations, *infra*. S. 18 also in its various rules contains the particular presumptions deduced from the special circumstances of the case.

ILLUSTRATIONS.

1. A. agrees to sell B. a quantity of iron on the condition that certain bills, then outstanding against A., should be taken out of circulation. A part delivery is made, but B. does not take up the bills. A. may maintain trover against B. for the iron delivered. *Bishop v. Shillito* (1819), 2 B. & A. 329a.

2. B. orders of A. a piano to be delivered at the premises of C., a packer, and to be paid for in ready money. A.’s servant delivers at C.’s premises, C. being away, on the understanding that the piano should be paid for before it was delivered to B. C. delivers to B., who does not pay A. A. may maintain trover against C. *Loeschman v. Williams* (1815), 4 Camp. 181 (*o*).

3. A. agrees to sell to B., for a lump sum of 900*l.*, a particular house and the furniture therein. The property in the furniture vests in B. on the completion of the sale of the house, the contract being entire. *Lanyon v. Toogood* (1844), 13 M. & W. 29 (*p*).

4. A. agrees to sell to B. a lease of premises, containing a greenhouse, with the chattels therein, for 4*l.* A. never makes a good title to the lease and greenhouse, but B. removes and uses the chattels. The property in the chattels vests in B. on his acceptance of them as aforesaid. *Sleddon v. Cruickshank* (1846), 16 M. & W. 71.

5. A. agrees to sell to B. a specific hydraulic press, payment to be made before delivery within a specified time. Within the time B. tenders the price. The press becomes B.’s property on the tender. *Cohen v. Foster* (1892), 61 L. J. Q. B. 643.

(*k*) *Ex parte Crawcour* (1878), 9 Ch. D. 419.

(*l*) Annotated Acts, No. 2, p. 11.

(*m*) *Stoveld v. Hughes* (1811), 14 East, 308; *Woodley v. Coventry* (1863), 2 H. & C. 164; *Knights v. Wifen* (1870), L. R. 5 Q. B. 660; see Benj. pp. 782, 787.

(*n*) *Bussey v. Barnett* (1842), 9 M. & W. 312; 1 Sm. L. C. (9th ed.) p. 166.

(*o*) Though the decision was that the goods could be stopped in transit, the case seems really to be one in which the property was involved.

(*p*) See also *Neal v. Viney* (1808), 1 Camp. 471.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

S. 18.

Rules for
ascertaining
intention.

Unless a different intention appears—*i. e.*, a different intention may appear from a consideration of the facts and circumstances mentioned in s. 17 (2), *ante*, p. 116; or the express agreement, course of dealing, or usage mentioned in s. 55. For the special instance of a contrary intention with respect to incomplete chattels, see notes to s. 18, Rule 2, *post*, p. 120.

Rules for ascertaining.—“The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, then *cadit questio*. But parties very frequently fail to express their intention, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case, the Courts have applied certain rules of construction which, in most instances, furnish conclusive tests for determining the controversy” (*q*). These tests are set out in the rules to s. 18.

As to the time when.—This phrase includes the “future time” and “conditions” spoken of in s. 1 (3), *ante*, p. 7.

Property in the goods.—The expression “goods,” including both specific and unascertained goods.

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Parke, J., well explains the law embodied in this rule in the S. 18, Rule 1. following words in *Dixon v. Yates* (*r*):—

“I take it to be clear that, by the law of England, the sale of a specific chattel passes the property in it to the vendee without delivery. . . . Where there is a sale of goods generally (*s*), no property in them passes till delivery (*t*); because, until then, the

(*q*) Benj. p. 274.(*t*) *i. e.*, some act of appropriation(*r*) (1832), 5 B. & Ad. at p. 340. under s. 18, r. 5 (1). See Benj.(*s*) As under ss. 16 and 18, r. 5 (1). p. 677, on this use of the word.

S. 18, Rule 1. very goods sold are not ascertained. But when by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery (*u*) of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." Other statements of the law are to the same effect (*v*).

An unconditional contract.—The parties may impose what conditions they please to the transfer of the property under ss. 1 (2) and 17 (1) (*w*). Instances are given in Rules 2—4 to s. 18.

Specific goods.—Defined in s. 62 (1) as "goods identified and agreed upon at the time the contract of sale is made."

In a deliverable state.—Defined in s. 62 (4) as "such a state that the buyer would, under the contract, be bound to take delivery of them." Where the goods are not in a deliverable state, Rule 2 applies.

Property—*i. e.*, under s. 62 (1), the "general property."

Passes when the contract of sale is made—*i. e.*, the same act that shows an acceptance by the parties of the "agreement to sell," shows also that the contract is at the same time a "sale" under s. 1 (3).

Time of payment . . . or delivery postponed.—"The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. . . . The fact in this case that the hay was not to be paid for till a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price" (*x*).

"Delivery" is defined in its true sense in s. 62 (1) as "voluntary transfer of possession." It was constantly used in the cases in the sense of "appropriation."

(*u*) See note (*t*), on preceding page.

(*v*) See in particular *Gilmour v. Supple* (1858), 11 Moo. P. C. 551; and per Lord Blackburn, in *Seath v. Moore* (1886), 11 Ap. Ca. at p. 370.

(*w*) See also per Cur., in *Calcutta, &c. Co. v. De Mattos* (1863), 32 L. J. Q. B. at p. 328.

(*x*) Per Bayley, J., in *Turling v. Baxter* (1827), 6 B. & C. 360.

ILLUSTRATION.

S. 18, Rule 1.

A. agrees to sell, and B. to buy, for 145*l.*, a specific stack of hay, then standing in a certain field, to be paid for in a month, and not to be cut till payment, and to be allowed to stand in the field for some months. Notwithstanding these stipulations, the property in the stack is transferred to B. immediately the contract is complete, and (the stack having been destroyed by fire) B. must bear the loss. *Tarling v. Baxter* (1827), 6 B. & C. 360.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

This rule is taken from Lord Blackburn's first rule (y) for S. 18, Rule 2, ascertaining the intention of the parties, with the addition as to notice to the buyer, which is new. Under this rule the single presumed condition precedent to the passing of the property is that the seller shall put the goods into a deliverable state, as defined in s. 62 (1); and the condition is presumed because the *seller* "is bound" by the contract to the act which has the result of putting the goods in that state. The reason for the rule is well put by Lord Blackburn in the following passage (z).

"In general, it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser, and as the vendor may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the vendor pure gain. It is therefore reasonable that when by the agreement the vendor is to do something before he can call upon the purchaser to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be, that the vendor was to do this before he obtained the benefit of the transfer of the property. The presumption does not arise if the things might be done after the vendor had put the goods in the state in which he had a right to call upon the purchaser to accept them, and would be unreasonable where the acts were to be done by the buyer, who would thus be rewarded for his own default."

(y) Blackburn, p. 174, reproduced in Benj. p. 281.

(z) p. 175.

S. 18, Rule 2. Such being the rule, the transfer of the property will not presumably be postponed, where—

- (1.) The seller is not *bound* to do the act (*a*):
- (2.) The act is not one for the purpose of putting the goods in a deliverable state, as, *e.g.*, when it is to be done *after* delivery (*b*):
- (3.) The act is to be done by the *buyer* (*c*).

As the *seller* is to do the act, the buyer cannot, on his default, perform it in his stead. This is a mere trespass on his part, and has no effect upon the transfer of the property (*d*). And the “something” which is to be done would seem to include not only acts done *directly* affecting the goods, but also such acts as the addition thereto of other goods, as on the sale of an entire quantity of goods, *e.g.*, a cargo (*e*). But such cases would seem more naturally to fall under s. 16, where the goods sold had not been *ascertained* (*f*).

Agreement to sell specific goods in an incomplete state.

The present appears the most suitable place to consider the law as it affects the transfer of the property in specific articles in an incomplete state. This is a particular instance of “a different intention” appearing under the first clause in s. 18, *ante*, p. 117.

The parties may agree (in the words of Lord Blackburn in *Seath v. Moore* (*g*)), “that a specific article shall be sold, and become the property of the purchaser as soon as it has attained a certain stage.” The cases have been concerned with the sale of ships, though the principles enunciated apply generally (*h*).

The law on the subject may be stated as follows:—

An intention that the property in a chattel to be made and finished shall, before it is in a deliverable state, be, at any particular stage of completion, transferred to the buyer, ought ordinarily to be inferred from the existence in the contract of a stipulation for the payment of an instalment of the price at some specified stage of the work, and from the due payment thereof, and from the work during its progress having been inspected by or on behalf of the buyer (*h*). And the question whether the

(*a*) *Swanwick v. Sothorn* (1839), 9 A. & E. 895; *Gilmour v. Supple* (1858), 11 Moo. P. C. 551.

(*b*) *Hammond v. Anderson* (1804), 1 B. & P. N. R. 69; *Greaves v. Hepke* (1818), 2 B. & A. 131; *North British Ins. Co. v. Moffatt* (1871), L. R. 7 C. P. 25.

(*c*) *Turley v. Bates* (1863), 33 L. J. Ex. 43; *Rugg v. Minatt* (1809), 11 East, 210.

(*d*) *Acraman v. Morrice* (1849), 19 L. J. C. P. 57.

(*e*) Per Blackburn and Lush, JJ., in *Anderson v. Morice* (1870), L. R. 10 C. P. 609; contra, per Lord Selborne, in 1 Ap. Ca. at p. 747.

(*f*) See per cur., in *Anderson v. Morice*, *supra*.

(*g*) (1886), 11 Ap. Ca. at p. 370.

(*h*) Per Lord Watson, *ibid.* at p. 380.

particular stage has been reached is one of fact (i). The instalments of the price must be appropriated to particular stages of the work, as otherwise, in the words of Parke, B., in *Laidler v. Burlinson* (j), "there is no sum which can be said to be the price of the chattel in its then state"; that is, no evidence of the buyer's consent "to accept of the subject in the same condition in which it then was as part of the completed subject which was to be subsequently delivered" (k).

S. 18, Rule 2.

The conditions, however, above laid down are not necessarily indispensable. Thus, it is not vital to the transfer of the property that there should be a stipulation in the original contract as to payment at specified stages, nor that such payment has been made (l). The absence of these facts may be supplemented by others, e.g., a subsequent agreement as to payment. All that is necessary is that facts should be "proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the corpus, so far as completed, as in part implement of the contract of sale" (l). But the principle and governing fact would seem to be the stipulation for payment by instalments as the work progresses, as (to use the words of the Court in *Woods v. Russell* (m), adopted in *Clarke v. Spence* (n)) "the payment of these instalments appears to us to appropriate specifically to [the buyer] the very ship so in progress, and to vest in [him] a property in that ship"; this view "being founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser" (n).

The following is a list of the salient facts in the decisions on this question, the case, if principally based thereon, being in Roman type:—

The decisions classified.

(1) Payment by instalments:

Woods v. Russell (m); *Clarke v. Spence* (n); *Laidler v. Burlinson* (o) (no such provision); *Wood v. Bell* (p).

(2) Signing by builder of certificate for registry in buyer's name:

Wood v. Russell (m).

(i) Per Lord Blackburn, *ibid.* at p. 370. *Moore, supra*, at p. 380.

(j) (1837), 2 M. & W. 602. (m) (1822), 5 B. & A. 942.

(k) Per Lord Watson, in *Seath v. Moore, supra*, at p. 384. (n) (1836), 4 A. & E. 448.

(l) Per Lord Watson, in *Seath v. Moore, supra*, at p. 384. (o) (1837), 2 M. & W. 602.

(p) (1856), 5 E. & B. 772 (in Ex. Ch.); 6 E. & B. 355.

S. 18, Rule 2.

(3) Supervision by buyer :

Clarke v. Spence (m); *Woods v. Russell* (n); *Wood v. Bell* (o) (an element); *Seath v. Moore* (p).

(4) Payment, but not appropriated to stages of work :

Laidler v. Burlinson (q); *Seath v. Moore* (p) (1st and 4th contracts).

(5) Dealing by buyer with builder's consent :

Wood v. Bell (o).

(6) Admissions by builder :

Wood v. Bell (o).

Transfer of
property in
materials.

With regard to materials (r) intended to form part of any chattel which by contract is to be made or finished, the result of the cases is that no property in materials is vested in the buyer of the chattel unless and until they have been affixed to, or become in a reasonable way part of such chattel (p). *Woods v. Russell* (n) on this point was disapproved in *Wood v. Bell* (o), and is no longer law. So also *Goss v. Quinton* (s). An intention to appropriate the materials is ineffectual (t).

And the buyer has notice thereof.—This is a new provision, and seems to be an improvement on the existing law. As the transfer of the property is a gain to the seller, and as, for that reason, the law has presumed an intention that he should strictly fulfil his part of the contract in rendering the goods ready for delivery before he is enabled to cast the onus of risk upon the buyer, it seems not unreasonable that the buyer should become acquainted with the fact that from that time forward the goods are at his risk.

"Notice" may mean either "notice" given by the seller, or "knowledge" acquired by the buyer. See remarks on this latter meaning under s. 25 (1), *post*, p. 165. The fact that the seller would free himself from further risk with regard to the goods when the acts to be done by him were completed, is an argument for the view that there is a duty cast upon him to notify this to the buyer. On the other hand, the Act does not provide that the seller shall give notice.

ILLUSTRATIONS.

1. A. contracts to sell to B. the trunks of certain oak trees, B. to mark the portions he wants, and A. to cut off, before delivery, the

(m) (1836), 4 A. & E. 448.

(n) (1822), 5 B. & A. 942.

(o) (1856), 6 E. & B. 355 (in Ex. Ch.).

(p) *Seath v. Moore* (1886), 11 Ap. Ca. 350.

(q) (1837), 2 M. & W. 602.

(r) These are, strictly speaking, not cases of sale at all; see notes to s. 1, *ante*, p. 3; but it would be inconvenient to omit all mention of them.

(s) (1842), 3 M. & G. 825.

(t) *Wood v. Bell*, *supra*. See also *Baker v. Gray* (1856), 17 C. B. 462.

rejected portions. B. marks the trees and pays for them. A. then becomes bankrupt, and B. severs the trunks and carries them away. A.'s trustee in bankruptcy is entitled to the trees, as the property had not passed to B. *Acraman v. Morrice* (1849), 8 C. B. 449. S. 18, Rule 2.

2. A. sells to B. a specified quantity of oats, being all that a particular bin contained, and gives B. a delivery order on C., the warehouseman, telling C. to weigh and deliver to B. C. does not weigh, but transfers the goods into B.'s name in his books. This is a contract for a specific bin of oats, the quantity of which is known, and A. is not bound to weigh them: consequently the goods become the property of B. without weighing. *Swanwick v. Sothorn* (1839), 9 A. & E. 895.

3. A. contracts to sell to B. a specific heap of clay, estimated at 1,500 tons, at 2s. a ton. B. is to load the clay in his own carts, and to weigh each load at his own expense at a weighing-machine situate on the road to his place of deposit. The property in the clay passes to B. on the completion of the contract. *Turley v. Bates* (1863), 2 H. & C. 200 (u).

4. A. sells to B. by auction particular lots of turpentine in casks, the lots to be filled up by A. to a requisite quantity, and all having to be gauged, on behalf of B., by a Custom House official. Some of the lots are filled up (and B. has notice), but none are gauged. They are then consumed by fire on A.'s premises. B. had paid for all the lots. B. is entitled to recover the price of the lots not filled up; the other lots were his at the time of the fire, as (1) A. had done all that he was bound to do; (2) the gauging was an act to be done by B. *Rugg v. Minett* (1809), 11 East, 210.

5. A. sells to B. a quantity of coffee, then in a warehouse, and gives him a delivery order on C., which entitles B. to immediate possession. By custom, A. is bound to warehouse the goods for two months free of charge. B. leaves the coffee with A. The coffee belongs to B., as A.'s warehousing the goods was not an act to put the goods in a deliverable state; and [submitted] was not a "something" to be done to the goods at all. *Greaves v. Hepke* (1818), 2 B. & A. 131 (v).

6. B. orders A. to build him a ship, the price to be payable by instalments at specified stages of the work. Three instalments are paid. A. also signs a certificate for the purpose of B. having his name registered as owner, which is done. The property in each completed part of the ship vests in B. on its completion. *Woods v. Russell* (1822), 5 B. & A. 942 (w).

7. A. agrees to build B. a ship, to be paid for by instalments, some at fixed dates, and others at particular stages of the work. These are paid in advance. B.'s superintendent, with A.'s privity, superintends the building and selection of materials; and B.'s name is, with A.'s consent, punched on the keel. A. refuses to assign the incomplete ship to B., but admits it to be his. A. then becomes bankrupt. The incomplete ship is the property of B. *Wood v. Bell* (1856), 5 E. & B. 772.

In the above case certain plates and irons, and plankings, intended for the ship, and adapted to her, but not affixed, lie on A.'s premises at the time of his bankruptcy. These materials are the property of A.'s assignees. *S. C.* (in Ex. Ch.) 6 E. & B. 355.

(u) Cf. *Kershaw v. Ogden* (1865), C. P. 25.

3 H. & C. 717.

(w) See also *Clarke v. Spence* (1836),

(v) Cf. *Hammond v. Anderson* (1804),

4 A. & E. 448; *Seath v. Moore* (1886),

1 B. & P. N. R. 69; *North British*

11 Ap. Ca. 350.

Ins. Co. v. Moffatt (1871), L. R. 7

S. 18, Rule 3.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

This rule is adopted from Lord Blackburn's second rule (x).

"Specific goods" and "deliverable state" are defined in s. 62 (1).

As under the preceding rule, the act must be one which (1) the *seller*, not the buyer, is *bound* to do: (2) and for the particular purpose mentioned, *i.e.*, in this case, ascertainment of the price. Any other kind of act *prima facie* has no effect upon the passing of the property.

The "act or thing with reference to" the goods would not appear to differ from the "something" which the seller is to do "to" the goods under the preceding rule, though the language of the two rules is not quite identical. No change of the previous law is probably intended.

For the purpose of ascertaining the price.—Under these words two subsidiary rules, which appear from decided cases, may be mentioned, *viz.*:—

- (1.) The fact that a provisional estimate of the price of the goods is agreed upon is relevant to prove that no further act for the ascertainment of the price is intended to be a condition precedent to the passing of the property (y):
- (2.) The act to be done by the seller may be *substantially* performed, though not exactly complete. Thus the adding up of items may be unperformed, and yet the property pass (z).

Buyer has notice thereof.—See on these words the notes to the preceding rule, *ante*, p. 122.

ILLUSTRATIONS.

1. A. contracts to sell to B. at 9*l.* a ton a specific stack of bark, the stack to be weighed by A. and B., and the price to be paid on a future

(x) Blackburn, p. 174; reproduced 10 C. P. 58, 609. See, in America, *Sheely v. Edwards*, 49 Am. R. 43.

(y) Per Cockburn, C.J., in *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436; *Anderson v. Morice* (1876), L.R. (z) *Tansley v. Turner* (1835), 2 B. N. C. 151. In America, *Bradley v. Wheeler*, 44 N. Y. 495.

day. Part is so weighed by both parties and delivered. B. has no property in the residue until weighing. *Simmons v. Swift* (1826), 5 B. & C. 857. S. 18, Rule 3.

2. A. agrees to sell to B. 289 bales of goat skins, containing five dozen in each bale, to be paid for by bill. By custom the seller counts the bales over to see that they contain the right quantity of skins. Before this is done the goods are destroyed by fire. B. refuses to accept the bill. He is not liable for non-acceptance, as the goods were not sold to him. *Zagury v. Furnell* (1809), 2 Camp. 240.

3. A. agrees to sell B. a raft of timber, stated to contain 71,000 feet, at 7½d. a foot, but at the same time hands B. a specification of a public officer showing the exact measurements. The raft is delivered at the appointed place, and, after delivery, is wrecked by a storm. B. must pay the price of the timber, as it has been sold to him, A. being bound to no act for the ascertainment of the price. *Gilmour v. Supple* (1858), 11 Moo. P. C. 551.

4. B. agrees to buy of A. four specific stacks of cotton waste, at 1s. 9d. a pound, and to send his own packer and sacks to remove them. B. packs all the stacks into the sacks, and weighs and takes part to his premises. B. is liable to pay for all the goods, as he agreed to buy the four specific stacks more or less, and no act of the seller's to ascertain the price was contemplated. *Kershaw v. Ogden* (1865), 3 H. & C. 717.

5. A. agrees to sell to B. a quantity of felled trees at 1s. 7½d. per foot cube. The trees are measured by A. and B., and the cubic contents of each tree is ascertained, but the total is not added up. The trees are the property of B., as nothing remains to be done to the trees by the seller to ascertain the price. *Tansley v. Turner* (1835), 2 B. N. C. 151.

6. A. sells to B. a specified quantity of oats, being all that an identified bin contained, and orders C., the warehouseman, to weigh and deliver. B. accepts a bill for the price. C. does not weigh. The property in the oats passes to B., as the identity is established, and, the quantity being known, weighing is not necessary to ascertain the price. *Swanwick v. Sothorn* (1839), 9 A. & E. 895.

Rule 4. When goods are delivered to the buyer on approval or on "sale or return" or other similar terms, the property therein passes to the buyer:—

- (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.
- (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

The transactions mentioned under this rule are special S. 18, Rule 4.

S. 18, Rule 4. instances of "conditional" contracts under s. 1 (2). See, as to the difference between "sale or return" and agency, *Ex parte White* (a), and *Ex parte Bright* (b).

Goods delivered "on sale or return" or "on approval."

The condition attaches both to the buyer's assent to the contract, and to the transfer of the property: "the formation of the contract is suspended till the condition is accomplished. If A. deliver his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become buyer not having been given when he obtained possession of the horse" (c). The buyer's approval will then, under this rule, pass the property in the horse.

"A man who has goods sent him on sale or return . . . receives the goods from the true owner with an option of becoming an owner, which can be exercised in one of three ways—by buying the goods at the price named by the vendor ["acceptance"]: by selling the goods to some one else, which is taken to be the declaration of his option ["act adopting the transaction"]: or by keeping them so long that it would be unreasonable that he should return them" [retainer "without giving notice of rejection"] (d).

Other similar terms—e.g. "on trial."

The elements of these cases, therefore, are:—

- (1.) Delivery on the terms specified:
- (2.) Acts of the bailee, as
 - (a) Acceptance or adoption: or
 - (b) Unreasonable retainer.

Delivered.—Defined in s. 62 (1).

S. 18, Rule 4,
(a) (b).

(a) and (b).—With regard to the acts of the buyer which operate to turn the transaction from a bailment into "a sale": *Firstly*, the buyer may, of course, expressly intimate his approval or acceptance; and he may also do so by implication. In this connection the "acts" mentioned in both clauses of this rule seem to be substantially identical with the "acceptance" under s. 35; e.g., an act "inconsistent with the ownership of the seller," under that section, would be an act "adopting the transaction," as by selling the goods (e), or making unreasonable user or trial of them (f).

(a) (1870), L. R. 6 Ch. 397.

(b) (1879), 10 Ch. D. 566.

(c) Benj. p. 67. See, in America, *Hunt v. Wyman*, 100 Mass. 198; *Carter v. Wallace*, 35 Hun, 189.

(d) Per Jessel, M.R., in *Ex parte Wingfield* (1879), 10 Ch. D. at p.

593.

(e) *Ibid.*

(f) Benj. p. 593, quoting *Elliott v. Thomas* (1838), 3 M. & W. 170; and *Lucy v. Moufflet* (1860), 5 H. & N. 229. See also *Okell v. Smith* (1815), 1 Stark. 107.

"In sales on trial . . . the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term, and this right is not affected by his telling the seller in the interval that the price does not suit him, if he still retains possession of the thing. Where a party is entitled to make trial of the goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, for, if so, the sale will have become absolute by the approval implied from thus accepting part of the goods" (g). And in cases of "sale or return" the same rule would apply: the buyer must act reasonably under the special circumstances of the case; otherwise he will have "adopted the transaction."

Secondly, with regard to the bailee's unreasonable retainer of the goods, *i. e.*, beyond the specified, or otherwise beyond a reasonable time: There must be a retainer, which means something more than the fact that the bailor is kept out of the possession of his goods: he must be kept out of it by means of some voluntary act on the part of the bailee, or under circumstances for the consequences of which the latter is responsible; and for this reason, that from the bailee's act an acceptance of the goods is to be inferred or presumed in accordance with the general principle of law that the retainer of a benefit does not give rise to a liability except under circumstances showing an implied promise to pay (h). As the bailee has a right to return the goods, the retainer must operate as the exercise of an option to take to the goods finally, *i. e.*, to "adopt the transaction." Consequently, if the facts of the case show that a return of the goods, either at all, or in their previous condition, has become impossible by reason of some event for which the bailee cannot be held responsible, there will be no retainer by him, or the right of return will not be lost, as the case may be. Thus the right of return is not lost if the goods are injured without the bailee's act or default (i); and there is no retainer if the goods similarly perish (j). But the bailee is probably responsible if a non-return is impossible by reason of the wrongful act or default of a third person (k); and, *a fortiori*, when the third person's act is brought about by the bailee's negligence (l).

(g) Benj. p. 593.

(h) See notes to *Cutler v. Powell* (1793), 2 Sm. L. C. (9th ed.) 1.

(i) *Chapman v. Withers* (1888), 20 Q. B. D. 824; *Head v. Tattersall* (1871), L. R. 7 Ex. 7. See, in *America*, *Carter v. Wallace*, 35 Hun,

189; *Hunt v. Wyman*, 100 Mass. 198.

(j) *Elphick v. Barnes* (1880), 5 C. P. D. 321.

(k) *Semble*, per Cur., in *Roy v. Barker* (1879), 4 Ex. D. 279.

(l) So held at N. P. in *Davidson v. Jones*, not reported, May 9, 1890.

S. 18, Rule 4.

These cases may be also adapted to another legal principle (stated in s. 7), that, viz., of *Taylor v. Caldwell* (l), that the continued existence of the goods in a condition capable of return is an implied condition subsequent of the contract, when the bailee is not in fault (m).

Many of the decided cases are, strictly speaking, not cases of "sale or return," but of absolute contracts of sale, subject to an express condition subsequent: see s. 1 (2). But the same principles substantially apply, so far as the question of return or non-return is involved.

As to the effect on the buyer's remedy for breach of warranty under s. 53 of a failure to return the goods in the contracts last mentioned, see *Head v. Tattersall* (n) and *Chapman v. Withers* (m), and compare the latter case with *Hinchcliffe v. Barwick* (o), and *McGarne v. Loy* (p).

Reasonable time.—Stated here (as also in s. 56) to be a question of fact, but it may be, under s. 55, modified by usage. And the time may be extended by the conduct of the parties, as when the bailee requests a fresh trial (q). And, as the time is allowed the bailee for the purpose of trying the goods, the time will run from his receipt of them, and not from the time of delivery to a carrier (r).

See, as to the "fixed time" (s) and a "reasonable time" (t), the cases in the notes.

Goods delivered to a person under this section would, *prima facie*, be in the "order and disposition" of the owner under the Bankruptcy Acts (u): see s. 61 (1) of this Act. And the bailee by selling them would do so "under the authority" of the owner by virtue of s. 21. He would also probably be in the position of a person who had "agreed to buy" the goods under s. 25 (2) (x); in this case, the "other right" of the seller, under the terms of that section, would be a right of property. But, from the nature of the transaction, there would be no controversy, as the bailor would have impliedly consented to the re-sale.

(l) (1863), 3 B. & S. 826.

(m) See *Chapman v. Withers* (1888), 20 Q. B. D. 824.

(n) (1871) L. R. 7 Ex. 7.

(o) (1880), 5 Ex. D. 177.

(p) (1839), 1 Cr. & Dix (Ir.) 286.

(q) Per Bovill, C.J., in *Heilbutt v. Hickson* (1872), L. R. 7 C. P. at p. 452, quoting *Adam v. Richards* (1795), 2 H. Bl. 573.

(r) *Jacobs v. Harbach* (1885), 2 Times L. R. 419.

(s) *Ellis v. Mortimer* (1805), 1 B. & P. N. R. 257; *Humphries v. Carvalho* (1812), 16 East, 45.

(t) *Beverley v. Lincoln Gas Co.* (1837), 6 A. & E. 829; *Moss v. Sweet* (1851), 16 Q. B. 493; *Ray v. Barker* (1879), 4 Ex. D. 279.

(u) *Ex parte Wingfield* (1879), 10 Ch. D. 591.

(x) See *Lee v. Butler*, [1893] 2 Q. B. 318; *Halby v. Matthews*, [1894] 2 Q. B. 262.

ILLUSTRATIONS.

S. 18, Rule 4.

1. A. agrees to sell B. a horse on a month's trial. At the end of a fortnight B. says he does not like the price, whereupon A. asks B. to return the horse; but B. keeps him ten days longer, and then returns him. A. cannot sue B. for the price of the horse, as B. had a month for trial, unless A. and B. intended, by the conversation, to rescind the original bargain and enter into an immediate sale. *Ellis v. Mortimer* (1805), 1 B. & P. N. R. 257.

2. A. sells to B. at auction a horse described as having hunted with the Bicester hounds, on the condition that the horse should be returned by a certain time if not answering the description, otherwise B. should be obliged to keep him. The description is false. The horse, while on its way to B.'s premises in charge of B.'s servant (but without B.'s fault), is injured. B. returns the horse to A. B. can recover the price paid. *Head v. Tattersall* (1871), L. B. 7 Ex. 7 (y).

3. A. sells B. a horse on trial for eight days. Within the time, without either party's fault, the horse dies. A. cannot recover the price of the horse. *Elphick v. Barnes* (1880), 5 C. P. D. 321.

4. A. consigns goods to B. on approval through a carrier, C. The goods are lost in transit. A. is the person to sue C. for the loss of the goods. *Swain v. Shepherd* (1832), 1 Moo. & R. 223.

5. A. sends B. a gas meter on approval in November. B., after a trial, returns it in May of the following year. B. must pay for it. *Beverley v. Lincoln Gas Co.* (1837), 6 A. & E. 829.

6. A. delivers goods to B. on the terms that B. is to account for the goods, if he sells them, at a fixed price, and that B. is at liberty to deal with the goods as he likes, and to sell at any price or on what terms he likes. The transaction amounts to a delivery on sale or return, and not to an agency between A. and B. *Ex parte White* (1879), 6 Ch. Ap. 397.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he

(y) This was strictly a case of a sale; cf. *Chapman v. Withers* (1888), condition subsequent dissolving the 20 Q. B. D. 824.

S. 18, Rule 5. is deemed to have unconditionally appropriated the goods to the contract.

S. 18,
Rule 5 (1).

We have seen, under s. 16, that a contract for the sale of unascertained goods is a mere agreement to sell unless and until the goods are ascertained. The present Rule shows under what circumstances a contract for such goods (including future goods) becomes "a sale" of them. As was pointed out in the remarks to s. 16, *ante*, p. 111, the present rule either lays down by implication the proposition that "ascertainment" means "an unconditional appropriation," or leaves "ascertainment" to take place as at common law (preserved, in that case, by s. 61 (2)), by means of a final appropriation, although additional conditions to the transfer of the property may be imposed.

Contract of sale.—From the nature of the case this means only an "agreement to sell."

Future goods.—Defined in ss. 5 (1) and 62 (1). Cases falling under these words must be distinguished from those, dealt with by Rule 2, of *specific* chattels not in a deliverable state.

Deliverable state.—Defined in s. 62 (4).

The subject-matter of the contract, then, being unascertained goods, the effect of this Rule may be shortly stated, as requiring, in order to a transfer of the property,—

(1) An unconditional appropriation, and one in conformity with the contract.

(2) By mutual assent.

Appropriated . . . with assent.—"After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of specific goods to the contract. The sole element in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in *Rohde v. Thwaites* (z), "the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes" (a).

Express or implied, and . . . before or after the appropriation.—By the terms of this Rule the assent by the one party to the appropriation made by the other may be either previous or subsequent, express or implied. The case of a subsequent assent by buyer or seller, as the case may be, presents comparatively little

(z) (1827), 6 B. & C. 388.

(a) Benj. p. 318.

difficulty, even where the assent is to be implied. "The only difficulty," says Mr. Benjamin (b), "that can arise on this question is in cases where the seller only has made the subsequent appropriation. If it has been agreed that the buyer shall select out of the bulk belonging to the seller, it is not easy to raise a controversy; but the cases in which the ablest judges have been much perplexed, are those where the seller is, by the express or implied terms of the contract, entitled to make the selection." The learned author is here alluding to the case where the buyer has given a previous implied assent to the seller's appropriating the goods. "A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, so many tons of oil, so many hogsheads of sugar. Here it becomes the seller's duty to *appropriate the goods to the contract*." This on the ground that the terms of the buyer's order shows an authority on his part to the seller to appropriate, i.e., a previous assent to the appropriation, if in all respects a proper one. "The difficulty is to determine what constitutes the appropriation; to find out at what precise point the seller is no longer at liberty to change his intention. It is plain that the seller's act in simply selecting such goods as he *intends* to send cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another buyer without committing a wrong, because they do not yet belong to the first buyer, and the seller may set aside other goods for him."

S. 18,
Rule 5 (1).
Appropriation
by seller.

The difficulty arises in fact when "one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and is not binding on the other party, unless it is made in pursuance of an authority to make the election conferred by agreement; or unless the act is subsequently, and before its revocation, adopted by the other party. In either case it becomes final and irrevocably binding on both parties. And the question of whether there has been a subsequent assent or not is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety" (c).

As an appropriation by one party under authority from the other implies the determination of an election, the ordinary rules of election apply. The rule is "that when from the nature of

(b) p. 318.

(c) Blackb. p. 129.

S. 18,
Rule 5 (1).

an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined; but till then he may change his mind. For example, suppose A. to sell out of a stack of bricks one thousand to B., who is to send his cart and *fetch them away*. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, and he may choose first one part of the stack, and then another, and repeatedly change his mind, *until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away*; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A. should *load* the bricks into B.'s carts, A.'s election would be determined as soon as that act were done, and not before" (c).

A previous assent, therefore, to an appropriation may be given by means of an authority to the other party to appropriate, such authority being presumed when, by the terms of the contract, the latter is to do some act with reference to the goods which cannot be done until they are appropriated by the other (d).

Goods of that description and in a deliverable state.—"When the contract is for goods not ascertained, the parties have first to agree upon what goods are to be delivered, and the seller may send, and the buyer accept, *any answering the description contracted for*" (e). In such a case "the goods selected must be treated as if they had actually been named in the contract" (f).

Thus, an appropriation must be in conformity with the contract, otherwise the authority is not duly pursued, and the appropriation amounts to a proposal for a new contract (g). *A fortiori*, when the appropriation is not under a previous authority. Thus, according to the terms of the present Rule, the goods must be "of the description" contracted for under s. 13. And they must also be "in a deliverable state," i.e., in the state in which the buyer is bound to accept under s. 62 (4); e.g., not excessive in number or quantity under s. 30. *Qy.*, whether

(c) *Benj.* p. 319.

(d) *Per Erle, J., in Aldridge v. Johnson* (1857), 7 E. & B. 885; *per Willes, J., in Campbell v. Mersey Docks* (1863), 14 C. B. N. S. 412.

(e) *Per Willes, J., in Gods v. Rose*

(1854), 17 C. B. 229.

(f) *Per Cotton, L.J., in Borrowman v. Free* (1878), 4 Q. B. D. at p. 505.

(g) *Per Parke, B., in Cunliffe v. Harrison* (1851), 6 Ex. at p. 906.

under these words an appropriation in the aggregate of goods to satisfy *two* contracts is good to pass the property to each buyer? (*h*). S. 18,
Rule 5 (1).

When the seller has authority to appropriate, and executes it *irregularly*, i.e., with reference to goods not "of the description" contracted for, &c., he may, if the buyer rejects the tender, withdraw it, within the time limited, if any, and substitute another (*i*). This, on the ground that the seller's election, not being in conformity with the contract, was revocable. It was left undecided in the above case whether the irregular appropriation could be made irrevocable by reason of the buyer's assent thereto; but there seems no reason why the buyer might not accept it, as he might any other offer. Appropriation irregularly made.

Unconditionally.—Furthermore, the appropriation made must be unconditional, otherwise the property does not pass. The most usual case is where the seller attaches a condition to the passing of the property, as, *e.g.*, where he reserves the "right of disposal" under sub-s. 2 of this section, and s. 19 (1); but the buyer may also do so.

To sum up the results of this Rule—The word "appropriation" is used in two senses, viz., (1) as meaning an offer by one party of the goods (*k*); and (2) a selection by one party under authority given by the other (*l*).

In case (1) a subsequent assent by the other party is necessary, as he has not previously agreed to buy those specific goods. In case (2) the selection, if complete and conforming to the contract, is binding on both, the assent being a previous one. And in both cases further conditions may be added to the appropriation.

The intermediate case is where (3) there is an irregular appropriation under (2), which requires a subsequent assent, as being really the case of a new offer under (1).

ILLUSTRATIONS.

1. B. orders A. to make him a machine, and deposits 4*l.* towards the price. When completed B. pays 2*l.* more, but makes no final settlement. A. requests payment of the balance. B. grumbles about the price, but requests A. to send the machine to him before payment; and subsequently says he will arrange it if time is given him. This is a contract for the sale of future goods by A. to B., and B. has afterwards impliedly assented (by his agreeing to the price) to A.'s appropriation. *Elliot v. Pybus* (1834), 10 Bing. 512.

2. A. agrees to sell B. twenty hogshheads of sugar at 56*s.* 6*d.* a cwt.

(*h*) See per Lord Selborne, in *Stock v. Inglis* (1882), 10 Ap. Ca. at p. 267.

(*i*) *Borrowman v. Free* (1878), 4 Q. B. D. 600.

(*k*) As in *Rohde v. Thwaites* (1827), 6 B. & C. 388, on next page.

(*l*) Per Erle, J., in *Aldridge v. Johnson* (1857), 7 E. & B. 885.

S. 18,
Rule 5 (1).

Four hogsheads are filled up and delivered to B. A. then fills up the sixteen hogsheads and requests B. to remove them, which B. says he will do as soon as he can. This is an implied subsequent assent of B. to the appropriation of the sixteen hogsheads. *Rohde v. Thwaites* (1827), 6 B. & C. 388.

3. B. orders A. to make him a greenhouse. When the greenhouse is finished A. writes to B., stating the fact, and asks for payment. B. sends the money, and asks A. to keep the greenhouse till he wants it. This is an implied subsequent assent of B. to A.'s appropriation. *Wilkins v. Bromhead* (1844), 6 M. & G. 963.

4. A. agrees to sell to B. five tons of oil out of a lot then lying at C.'s wharf. A. orders C. to transfer five tons into B.'s name, and sends B. C.'s acknowledgment to that effect; but B. is not to retain the paper without payment. B. retains the acknowledgment, but refuses to pay. B. has not assented to A.'s appropriation according to its terms, the appropriation being made conditional on payment. *Godts v. Rose* (1855), 17 C. B. 229.

5. A. agrees to sell and ship to B. a cargo of maize, the bill of lading to be dated within a certain period, and to have the shipping documents attached. A. tenders by bill of lading, without the documents, the cargo of the C. B. refuses. A. then, in proper time, tenders the cargo of the D. with the shipping documents. This last appropriation is binding on B., as the previous one, not being according to B.'s authority, was revocable by A. *Borrowman v. Free* (1878), 4 Q. B. D. 500.

6. A. agrees to sell B. two pockets of hops (of which he had three) by sample, at 7l. 15s. a cwt., the same to be left with A. till B. wrote for them. A. then sets apart two pockets and puts B.'s name on them, and sends B. an invoice showing the weights. B., in the meantime, had bought elsewhere, and says so. There is no subsequent assent by B. to A.'s appropriation, and no previous assent, as he had not authorized A. to appropriate. *Jenner v. Smith* (1869), L. R. 4 C. P. 270.

S. 18,
Rule 5 (2).

The seller delivers the goods to the buyer or to a carrier, etc.
—By this sub-section an unconditional appropriation, within the meaning of the preceding sub-section, is presumed when the seller delivers *simpliciter* to the buyer, or to a carrier, pursuant to the contract. The sub-section is based upon the previous law, as laid down in *Dutton v. Solomonson*(*m*), and *Dunlop v. Lambert*(*n*).

It must also be remembered that the appropriation will not pass the property unless the provisions of s. 4 are otherwise satisfied, as a delivery to a carrier is no "acceptance"(*o*).

We have seen from the extract from Mr. Benjamin, quoted under sub-s. 1 (*p*), that a previous assent by the buyer to the seller's appropriation is implied when the latter is to do some act with reference to the goods which cannot be done till the goods are appropriated: and that the seller's election is finally determined when such act commences. The present sub-section gives

(*m*) (1803), 3 B. & P. 582.

(*n*) (1839), 6 C. & F. 600.

(*o*) *Coombs v. B. & E. Ry. Co.*
(1858), 3 H. & N. 510; per Parke,

B., in *Wait v. Baker* (1848), 2 Ex. 1.

See *ante*, pp. 30 and 35.

(*p*) *Ante*, p. 132.

an instance, and that the most usual one, of such an act, that is, the seller's delivering (*i.e.*, transferring the possession under s. 62 (1)) the goods selected to the buyer or a carrier "in pursuance of the contract," *i.e.*, under the buyer's authority. "The goods" must, of course, be in all respects according to the contract (*q*), as provided in sub-s. 1, otherwise the attempted appropriation is ineffectual to pass the property.

S. 18,
Rule 5 (2).

Whether named by the buyer or not.—These words must be read in connection with the words "in pursuance of the contract." For, if a particular carrier be specified, the delivery must be made to him (*r*). And, in spite of a delivery to a carrier, it may be "pursuant to the contract" that the seller should deliver *at the destination*; in this case, the property will not pass till arrival (*s*). The seller would, it is conceived, be reserving "the right of disposal" up to that time.

And does not reserve the right of disposal.—The delivery may be *conditional*, as where the seller reserves the right of disposal under s. 19 (1). In this case, "however definite and complete . . . may be the determination of election on the part of the seller, where the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation" (*t*). The presumption is founded on the fact that, where a carrier intervenes, the seller, by delivery, loses his lien under s. 43 (1) (a), and, consequently, it is his interest that the property should not pass. Therefore, where he reserves the right of disposal, an intention on his part to preserve the right of property is presumed (*u*).

ILLUSTRATIONS.

1. B. orders goods of A. to be despatched to him at a distance. A. sends them off by C., a carrier, in whose hands they are damaged. B. may sue C., as he is the owner of the goods which became his when A. sent them off, and thereby finally appropriated them according to his authority. *Fragano v. Long* (1825), 4 B. & C. 219.

2. B. orders of A. a quantity of goods, and sends his own ship for them. A. ships the goods on B.'s behalf, without reserving any right of disposal. The goods are B.'s on shipment. *Ogle v. Atkinson* (1814), 5 Taunt. 759.

3. A. agrees to sell B. 100 quarters of barley out of the bulk in A.'s granary, B. to send sacks therefor, and A. to fill them. B. sends 200

(*q*) Per Parke, B., in *Wait v. Parr*, 141 Mass. 593; and *Ullock v. Baker* (1848), 2 Ex. 1. See, in *Reddelein* (1828), Dans. & Ll. 6.

America, a case directly deciding the point: *Ardsberg v. Latta*, 30 Iowa, 442. (*s*) *Dunlop v. Lambert* (1839), 6 C. & F. 600.

(*t*) Benj. p. 345.

(*r*) See, in America, *Hills v. Lynch*, 26 N. Y. Sup. Ct. 42; *Wheelhouse v.*

(*u*) See Blackb. p. 142.

S. 18,
Rule 5 (2).

sacks, and A. fills 155. The barley in the 155 sacks has been unconditionally appropriated to B., as A., by filling the sacks, exercised his election to appropriate; but B. has no right to the barley sufficient to fill the 45 sacks. *Aldridge v. Johnson* (1857), 7 E. & B. 885 (x).

Reservation
of right of
disposal.

19.—(1.) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

S. 19.

The effect of the three sub-sections to this section may be thus shortly stated :—

The seller's reservation of the right of disposal subject to conditions makes the transfer of the property, notwithstanding delivery under s. 18 (2), dependent on those conditions (sub-s. 1):

Taking the bill of lading to order is *primâ facie* such a reservation (sub-s. 2):

The transmission of the bill of lading and bill of exchange

(x) See also *Langton v. Higgins* (1859), 4 H. & N. 402; and distinguish these cases from *Anderson v. Morice* (1876), 1 Ap. Ca. 713, where

there was a contract for an *entire* bulk or cargo, which did not come into existence till completion.

together to secure the latter, imposes the condition that the bill of exchange be honoured (sub-s. 3).

S. 19.

The two latter sub-sections, of course, apply only to cases of shipment. Sub-s. 1 applies generally.

The seller may, by the terms of the contract or appropriation, reserve the right of disposal. — This sub-section should probably be construed *reddendo singula singulis*; that is, the word "contract" should be attributed to "specific goods," and "appropriation" to "where goods are subsequently appropriated." It says, in effect, that when the goods are specific or subsequently ascertained, a further condition to the transfer of the property may be imposed by the seller. This is in accordance with the previous law.

S. 19 (1).

The provision with regard to specific goods would appear to be a further explanation of the law laid down in s. 17 (1), *ante*, p. 113, and may be illustrated by a contract of sale of specific goods to be paid for on or before delivery (y).

On the general rule in this sub-section, Mr. Benjamin makes the following remarks (z):—"It has already been shown that the rules [*i. e.*, in s. 18] for determining whether the property in goods has passed from seller to buyer are general rules of construction, adopted for the purpose of ascertaining the real intention of the parties, where they have failed to express it. Such rules, from their very nature, cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the seller, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation."

The learned author then goes on to show that a seller may take a bill of lading for the goods shipped to his own order or that of his agent, and then do either one or other of two things, viz., (1) send it to his agent with instructions not to transfer it to the buyer, except on payment, this is the case mentioned in sub-s. 3; or (2) sell a bill of exchange drawn on the buyer to a third party, to whom he also transfers his bill of lading to be transferred to the buyer on payment of the bill of exchange. This is contained by implication in sub-s. 1, but does not appear to fall under sub-s. 3.

Modes by which the seller may reserve it.

(y) Per Bayley, J., in *Bishop v. Cohen v. Foster* (1892), 61 L. J. Q. B. 643.

Shillito (1819), 2 B. & A. 329, n. (a);

(z) p. 345.

S. 19 (1).

"Now in both these modes of doing business, it is impossible to infer that [the seller] had the least idea of passing the property . . . at the time of appropriating the goods to the contract. So that, although he may write . . . and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for [the buyer's] account, and in accordance with [his] order, making his election final and determinate, the property in the goods will, nevertheless, remain in [the seller], or in the [third person], as the case may be, till the bill of lading has been indorsed and delivered up to [the buyer]" (z).

The question in all these cases, of course, is, Has the seller evinced an intention of passing the property? not Has he committed a breach of contract (a)? In *Wait v. Baker* (b), for example, the seller by the acts he did, i.e., transferring the bill of lading elsewhere, although cash was tendered, was committing a breach of contract; and yet it was held that the property did not pass, his intention being clear that it should not.

When the intention of reserving the right of disposal is clear, it is immaterial that the invoice of goods shipped states them to be shipped "on account of and at the risk of" the buyer; or that (on shipment on the buyer's own ship) the bill of lading states the goods freight free, as being the buyer's own property (c). And when the bill of lading is taken to the buyer's order, and sent to him *unstamped*, the seller, by keeping the stamped copy in his possession, may reserve the right of disposal (d).

S. 19 (2).

Goods deliverable to the order of the seller, &c.—By this sub-section the right of disposal is only *prima facie* reserved by the seller's taking the bill of lading to his own order or that of his agent. It follows Mr. Benjamin's third and fourth rules (e).

"If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, *not as agent or on behalf of the purchaser*, but on his own behalf, it is held that he thereby reserves to himself the power of disposing of the property; and

(z) Benj. p. 346.

(a) Per Cur., in *Browne v. Hare* (1859), 4 H. & N. 822; per Bramwell, L.J., in *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. at p. 170.

(b) (1848), 2 Ex. 1.

(c) *Turner v. Trustees of Liverpool Docks* (1851), 6 Ex. 543.(d) *Moakes v. Nicholson* (1865), 19 C. B. N. S. 290.

(e) Benj. p. 370.

that, consequently, there is no final appropriation, and the property does not, on shipment, pass to the purchaser" (f).

S. 19 (2).

The seller is *prima facie* deemed, etc.—The words in italics in the above judgment show the limitation to be placed upon the rule, and partly illustrate the words "*prima facie*" in this sub-section. The question is, did the seller, by taking the bill of lading in that form, intend to *preserve control* over the goods, or not? The question is one for the jury (g). Thus, as in *Joyce v. Swan* (h), the seller may be only uncertain of the buyer's meaning in grumbling about the price, and, as a *method* of precaution only, and in case the buyer intends to refuse the goods (there being, in fact, no such intention) may take the bill of lading to his own order. See also *Browne v. Hare* (i). In such a case he is deemed to be acting as the buyer's agent only.

So the facts of the case may otherwise show that the seller, in taking the bill of lading in this form, did not intend to reserve the right of disposal; as, *e.g.*, when he indorses it, and transmits it, *to the buyer direct* (k), or (when so indorsed) even to his own agent (l). The Court of Appeal, in *Ex parte Banner* (m), stated the rule "as perfectly settled, that if a consignor in such a case wishes to prevent the property in the goods and the right to deal with the goods while at sea from passing to the consignee, he must, by the bill of lading, make the goods deliverable to his own order, and forward the bill of lading *to an agent of his own*. If he does not do that he still retains the right of stopping the goods *in transitu*; but subject to that right the property in the goods, and the right to the possession of the goods, is in the consignee."

"Where the consignor sends these documents *direct to the consignee*, that ought to lead to the inference, and only properly lead to the inference, that he intended the consignee should have at once the disposal of the property, and possession of the goods consigned, leaving to him, *as a matter simply of obligation* under the contract, to return the bills of exchange accepted, not as a condition precedent to the property vesting, but simply as a matter of contract" (n).

The right of disposal is not affected by the seller's sending

- (f) *Per Cotton, L.J., in Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. at p. 172. 7 M. & G. 882; *Key v. Cotesworth* (1852), 7 Ex. 595.
- (g) *Van Casteel v. Booker* (1848), 2 Ex. 691. (i) *Browne v. Hare* (1859), 4 H. & N. 822.
- (h) (1864), 17 C. B. N. S. 84. (m) (1876), 2 Ch. D. at p. 288.
- (i) (1859), 4 H. & N. 822. (n) *Per Cockburn, C.J., in Shepherd v. Harrison* (1869), L. R. 4 Q. B. at p. 203.
- (k) *Wilmshurst v. Bowker* (1844),

S. 19 (2). direct to the buyer an *unindorsed* bill of lading, when he keeps the indorsed bill under his own control (*o*), as an unindorsed bill is equivalent to no bill at all (*p*). So also where he keeps the only bill stamped in his own possession (*q*).

S. 19 (3). **Transmits the bill of exchange and bill of lading to the buyer.**
—By this sub-section the transmission of the bill of lading together with the bill of exchange to the buyer to secure the price, imposes, as a condition to the transfer of the property in the goods shipped, the honour of the bill of exchange. It is apparently based upon Mr. Benjamin's sixth rule (*r*), which was intended to embody the effect of the decision in *Shepherd v. Harrison* (*s*). But it is important to advert to the particular circumstances of that case, which undoubtedly governed the decision. The seller there took a bill of lading making the goods deliverable to his own order, and forwarded it with the bill of exchange, not to the buyer, but to the seller's own agents, and these latter forwarded the bill of lading and the bill of exchange together to the buyer, accompanied by a letter in which they said: "We enclose bill of lading, &c., shipped by [the seller] on your account. We hand also the draft on your good selves for cost of the cotton, to which we beg your protection." The buyer retained the bill of lading, and sent back the bill of exchange unaccepted, and it was held by the House of Lords that, *under these special circumstances*, the seller had reserved his right of disposal of the goods. The learned Lords point out (*t*) that the question was one entirely of fact depending on the circumstances stated in the special case. But the decision affords no authority for the general proposition, that previous to the Act the transmission to the buyer *direct* of the bill of lading (in whatever form it may be taken), together with the bill of exchange, prevented the property in the goods from passing to the buyer unless he accepted the bill of exchange. This is evident from the judgment of Cotton, L.J., in *Mirabita v. Imperial Ottoman Bank* (*u*). He says:—

"So, if the vendor deals with, or claims to retain the bill of

(*o*) *Brandt v. Bowlby* (1831), 2 B. & Ad. 932; *Wait v. Baker* (1848), 2 Ex. 1.

(*p*) Per Cockburn, C.J., in *Shepherd v. Harrison* (1869), L.R. 4 Q. B. at p. 204.

(*q*) *Moakes v. Nicholson* (1865), 19 C. B. N. S. 290.

(*r*) p. 371.

(*s*) (1871), L. R. 5 H. L. 116.

(*t*) Per Lord Chelmsford, at p. 123; and per Lord Cairns, at p. 133.

(*u*) (1878), 3 Ex. D. at p. 172; and see the judgment of Mellish, L.J., in *Ex parte Banner* (1876), 2 Ch. D. 278, where *Shepherd v. Harrison* was distinguished.

lading in order to secure the contract price, as when he sends forward a bill of lading with a bill of exchange attached, *with directions* that the bill of lading is *not to be delivered to the purchaser* till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Trustees of Liverpool Docks* (x); *Shepherd v. Harrison* (y); *Ogg v. Shuter* (z). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done."

S. 19 (3).

Now the language of this sub-section is perfectly general. It refers to "the bill of lading" without any qualification; so that, apparently, the form of the bill of lading is immaterial, and it may be a bill of lading drawn either to the seller's order, or to that of the buyer. Again, the sub-section says "transmits to *the buyer*," and not to the seller's agent. If the direct transmission to the buyer of a bill of lading, in whatever form it may be taken, is authorized by this sub-section, then the law is changed. In that case, the bill of lading in the buyer's hands will be subject to the condition imposed by the seller (the words "to secure" being read only as meaning "with the intention of securing"), and the seller's security will then be his intention, either expressed, or implied from the fact of the bill of lading and the bill of exchange being transmitted together, that the one document should be dependent upon the other, although he has committed both to the control of the buyer. It may, however, be contended that the words "transmits to the buyer" are governed by the following words, "to secure acceptance, &c.," and that the latter words mean *in such a manner* as to secure, *i.e.*, according to the previous law, through the hands of the seller's agent, the bill being originally taken to the seller's order as in sub-s. 2, *supra*; or (as Cotton, L.J., puts it in the above judgment) "sent forward *with directions that it is not to be*

Effect of this
sub-section
on the
previous law.

(x) (1851), 6 Ex. 543.

(z) (1875), 1 C. P. D. 47.

(y) (1869), L. R. 4 Q. B. 196.

- S. 19 (3). *delivered to the buyer till acceptance, &c.*" That this was the effect of the previous law also appears from the judgment of the Court of Appeal in *Ex parte Banner (a)*, where it is laid down that, in order to secure payment of the bill of exchange, the seller must have "taken the precaution of making the goods by the bill of lading deliverable to his own order, and transmitted the bill of lading to an agent of his own, with directions not to hand it over . . . unless the bill of exchange is accepted."

ILLUSTRATIONS.

- S. 19. 1. A. agrees to sell to B. five tons of oil at 53s. a cwt., and orders C., the warehouseman, to transfer into B.'s name a particular lot of oil. C. does so, and hands A. an acknowledgment addressed to B. that the oil had been so transferred. A. sends B. the acknowledgment and an invoice of the oil to be exchanged for a cheque, but B. refuses the cheque and retains the acknowledgment, and gets delivery of the oil from C. A. may maintain trover against B., as the property in the oil had not passed to the latter, A. having reserved the right of disposal subject to B.'s payment. *Godts v. Rose* (1855), 17 C. B. 229.
2. A. agrees to sell to B. a specific article on the terms that payment is to be made before delivery within a given time. A. has reserved the right of disposal of the article subject to the condition of payment. If B. tenders within the time the thing becomes his. *Cohen v. Foster*, (1892) 61 L. J. Q. B. 643.
3. A. sells goods to B., drawing bills on him for the price, and takes the bill of lading to his own order, which he transfers to C., the purchaser of the bills. A. sends B. an invoice stating that the goods are shipped on B.'s account and at his risk. B. becomes owner when he pays the bills. *Jenkyns v. Brown* (1849), 14 Q. B. 496.
4. A. agrees to sell goods to B. free on board, to be paid for by bill at three months on delivery of the bill of lading. A. takes the bill of lading to his own order, but indorses it to B., and sends the bill with an invoice and bill of exchange to his own agent, C. The property vests in B. on shipment, as, though A. *prima facie* reserved the right of disposal, the facts show that he intended B. to have the goods, as he immediately indorsed it to B. *Browne v. Hare* (1858), 4 H. & N. 822.
5. B. orders of A. a quantity of guano. A. writes of the engagement of a ship to carry the guano, and says the price is 10l. a ton. B. replies grumbling at the price, but not expressly repudiating the contract. A. being uncertain whether B. would accept, takes the bill of lading to his own order. B. had no intention of repudiating the contract. The property in the cargo vests in B. on shipment, as A., by taking the bill of lading to his own order, did so, not to reserve the right of disposal, but to protect himself if B. refused to admit the price. *Joyce v. Swan* (1864), 17 C. B. N. S. 84.
6. A. sells goods to B., and ships them, taking the bill of lading to his own order, which he sends, with a bill of exchange on B., to C., A.'s agent. A. sends B. an invoice stating that the goods were at B.'s risk, and that A. had drawn upon him in favour of C. C. forwards the bill of lading and bill of exchange to B. B. refuses to accept the bill, but retains the bill of lading, and demands the goods from D., the master

(a) (1876), 2 Ch. D. at p. 287; a case of principal and agent, but so far as relates to the transfer of the property, the same principles of law are applicable.

of the vessel, who delivers to C. D. is not liable to B. in trover. *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116.

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7. A., B.'s agent, consigns goods to B., sending the bill of lading making the goods deliverable to B. directly to B., and advising B. of bills of exchange which he had drawn upon B. and sold to third parties. The property in the goods passes to B. on shipment, as A. had not taken the bill of lading to his own order and sent to his own agent. *Ex parte Banner* (1876), 2 Ch. D. 278.

8. A. sells a cargo of timber to B. on the terms that the bill of lading should be delivered on payment of a bill of exchange. A. takes the bill of lading to his own order, and transfers to C., to whom he also transfers the bill of exchange. B. tenders the price to C., but C. sells the cargo. C. is liable to B. in trover, as B. has fulfilled the condition, and the property then vested in him. *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Risk *prima facie* passes with property.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Under this section the risk of loss is regulated by—

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- (1.) Mutual agreement:
- (2.) The fact of ownership:
- (3.) Delay in delivery wrongfully caused:
- (4.) Express or implied bailment.

Firstly, with respect to mutual agreement.

Mutual agreement.

Though the fact that one party is to bear the risk affords a strong argument that he is also to be the owner, yet "the two are not inseparable. It may very well be that the property shall be in one, and the risk in the other" (b). "There is no rule of law to prevent the parties . . . from making whatever bargain they please [under s. 55]. . . . The parties . . . may intend that the

(b) *Per Blackburn, J.*, in *Martineau v. Kitching* (1874), L. R. 7 Q. B. at p. 454.

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vendor shall deliver the goods to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable until the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped [under s. 18, Rule 5 (2)], that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving . . . but without any contract on the vendor's part . . . to procure the goods to arrive" (c).

In the same way, "I see no reason," says Lindley, L.J. (d), "why a person should not agree to buy and pay for a portion of a cargo, say of sugar in bags or corn in bulk, although the actual sugar or corn to be delivered may not be ascertained before the ship is unloaded."

An agreement that one party is to bear the risk (irrespective of the passing of the property) may, of course, be either expressly made, or may be inferred from the circumstances of the case: see s. 49 (2), and notes. Thus, the fact that one party is to insure the goods and the other not, is, coupled with the fact of such insurance, relevant to prove such an agreement (e).

Effect of
shipment
"free on
board."

In some cases, the goods contracted to be sold are to be shipped to the buyer "free on board." In the case of specific goods, these words mean that the goods are put on board "on account of the person for whom they are shipped; and in that case the goods . . . would be at the risk of the buyer, whether they were lost or not on the voyage . . . even though payment is not to be made on the delivery of the goods on board but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash" (f).

In the case of unascertained goods, the same principle will apply, unless there is anything in the contract inconsistent therewith (f).

(c) Per Blackburn, J., in *Calcutta, &c. Co. v. De Mattos* (1863), 32 L. J. Q. B. at p. 328; *Beer v. Walker* (1877), 25 W. R. 880, illustrates this rule.

(d) In *Stock v. Inglis* (1884), 12 Q. B. D. at p. 577.

(e) *Anderson v. Morice* (1876), 1 Ap.

Ca. at pp. 730, 743, 747.

(f) Per Brett, M.R., in *Stock v. Inglis* (1884), 12 Q. B. D. at p. 573. This case was affirmed on other grounds, 10 Ap. Ca. 263. In the C.A. the Court referred largely to the course of dealing between the parties.

Secondly, the fact of ownership.

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"Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods. If anything remains to be done on the part of the seller, until that is done the property is not changed" (g). The fact of ownership.

"Where a bargain and sale is completed with respect to goods, . . . any accident happening to the things subsequently, unless it is caused by the fault of the vendor—any calamity befalling them after the sale is completed—must be borne by the purchaser, and by parity of reasoning any benefit to them is his benefit, and not that of the vendor" (h).

For the case where the goods, being specific, perish before the risk has passed to the buyer, see s. 7, *supra*.

Thirdly, wrongful delay in delivery: With regard to the risk where the delivery is *insufficient*, see s. 32 (2), (3), and for cases of *necessary* deterioration in transit, see s. 33. Wrongful delay in delivery.

The first proviso appears to be founded upon the judgment of Blackburn, J., in *Martineau v. Kitching* (i), where he says: "By the civil law it always was considered that if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk, just as if the *emptio* were *perfecta*. . . . When the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass . . . yet because the non-completion of the bargain and sale . . . was owing to the delay of the purchaser, the purchaser should bear the risk, just as if the property had passed" (k).

It will be seen from the above extract, as compared with the terms of the first proviso to this section, that the Act seems to extend the proposition of law laid down by Blackburn, J. That proposition was that, if the *passing of the property* is prevented by the delay of either party, that party must bear the risk. The Act says that if the "delivery" (which is defined in s. 62 (1) as "voluntary transfer of possession from one person to another") is delayed by the "fault" (defined in s. 62 (1) as "wrongful act

(g) Per Bayley, J., in *Simmons v. Swift* (1826), 5 B. & C. 857, 862.

(h) Per Blackburn, J., in *Sweeting v. Turner* (1871), L.R. 7 Q.B. 310, 313.

(i) (1872), L.R. 7 Q.B. 436, 456.

(k) *McConihe v. N. Y. & Erie Ry. Co.*, 20 N. Y. 495, was another such case, but there the Court found that the loss was not caused by the buyer's delay.

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or default") of either party, the goods are at the risk of the party in fault as regards any loss "which *might* not have occurred but for such fault." Generally, the same act which shows a delivery, will also serve to pass the property, and the two propositions would be identical; but cases may be imagined where the property has not passed, and yet delivery has been delayed. Suppose a contract for the sale of a piano, to be paid for by instalments, the property not to pass till all the instalments are paid, and the buyer to take or receive delivery by a certain date. He makes default, and the piano is burnt by an accidental fire on the seller's premises. Here the buyer would have delayed the delivery, but not the passing of the property.

This section, apparently, throws upon the party in default (and irrespective of the transfer of the property) the risk of any loss of which the delay was the possible cause. This liability being a serious one, probably a strict interpretation of the words "wrongful act or default" would be adopted. The same words have been construed, in a shipping case, as equivalent to culpable negligence (*l*).

Express or
implied
bailment.

Fourthly, express or implied bailment. After the sale is complete, the seller is the buyer's bailee until the time appointed for delivery of the goods (*m*). And the seller would appear to be a bailee *for reward*, on the ground that part of the consideration for the price is the custody of the goods by the seller until a reasonable time elapses for the buyer to take delivery: see the analogous case of a carrier, and the reasoning of the Court (*n*). After the expiration of that time the consideration, so far as custody for reward is concerned, is exhausted, and the seller would seem to be a gratuitous bailee, and may then charge for the custody, and recover compensation for the buyer's delay in taking delivery. See s. 37.

Similarly, when the buyer is in possession of the seller's goods, he will also be a bailee, *e.g.*, in the case of goods sent on sale or return, on trial, &c. (*o*). Here the bailment being beneficial to both parties, the buyer would also appear liable for ordinary negligence. But after a rightful rejection of the goods under s. 36, the buyer is, it is submitted, in the position of a gratuitous bailee.

The editors are aware of no English case laying down the rights and liabilities of the buyer and seller as bailee for the

(*l*) *The Famenoth* (1882), 7 P. D. 207; under s. 242 of the Merchant Shipping Act, 1854.

(*m*) Benj. p. 716.

(*n*) *Cairns v. Robins* (1841), 8 M. & W. 258; see also Fr. Civ. Code, ss. 1136—1138.

(*o*) Benj. p. 67.

other, and particularly as to the character of the bailment. See, however, the American case of *Koon v. Binkerhoff* (p), and Story on Sales, ss. 300a, 300b, 393; *Id.* on Bailm. (9th ed.) s. 448.

S. 20.

ILLUSTRATIONS.

1. A. agrees to sell to B., at so much a cwt., a number of sugar-loaves, to be weighed when delivered, to be paid for in one month, and to be at A.'s risk for two months. B. makes delay in taking delivery after the two months, and the loaves are then destroyed by fire on A.'s premises. Whether or not the property has passed to B., B. must pay for the loaves (1) as the risk was to be his after two months; (2) [perhaps] because the delay in delivery was his fault (q). *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436.

2. A. agrees to sell B. a cargo of ice, B. upon receipt of bill of lading to take upon himself all risks of the seas, &c., and to pay for it in cash on delivery at 20s. a ton, weighed on board on delivery. The cargo is lost. B., whether owner or not, must pay for it, as he assumed the risk of delivery being prevented by dangers of the sea. *Castle v. Playford* (1870), L. R. 7 Ex. 98.

3. A. agrees to sell and ship to B. a cargo of coal, payment to be made in cash, one half on A.'s handing over to B. the bill of lading and policy of insurance, the other half on delivery at the destination. B. receives the bill of lading and policy, and pays half the price. The cargo is lost in transit. A. cannot recover the balance of the price from B., as he took the risk (so far as regards half the price) of the goods arriving; nor can B. recover the half price paid, as they were the owners of the goods from the time of shipment, and took the risk to the extent of the half price paid. *Calcutta, &c. Steam Navigation Co. v. De Mattos* (1863), 32 L. J. Q. B. 322; affirmed 33 L. J. Q. B. 214.

4. B. orders goods of A., to be dispatched on insurance being effected, and to be paid for three months after arrival. The goods are dispatched, and B. insures. The goods are lost in transit. B. must bear the risk, as the goods vested in him on their being sent off, and (with respect to the three months' credit after arrival) B.'s action in insuring shows that it was also intended that he should bear the risk of non-arrival. *Fragano v. Long* (1825), 4 B. & C. 219 (r).

5. A. sells B. a specific stack of hay, the stack to remain where it was for a specified time, and not to be cut till paid for. B. pays for the hay. Within the period the stack is consumed by fire. B. cannot recover the price paid from A., as the stack was his by the contract, and he must bear the risk. *Tarling v. Baxter* (1827), 6 B. & C. 360.

6. A. agrees to make for and sell to B. a number of cars by a particular date, B. to furnish part of the materials which could not be procured elsewhere. B. makes great delay, though repeatedly requested, in providing this part. The incomplete goods are accidentally burnt without A.'s fault. If B.'s delay amounts to a "fault," B. is responsible, if the fire might not otherwise have happened. *McConihe v. N. Y. and Erie Ry. Co.*, 20 N. Y. 495.

7. A., in London, contracts to supply B., at Brighton, with a quantity of rabbits. A. has, by agreement implied from the circumstances, to bear the risk of the rabbits arriving within a reasonable time in an unmerchantable condition at Brighton, though they may be sound when dispatched. *Beer v. Walker* (1877), 25 W. R. 880.

(p) 39 Hun. (N. Y.) 130.

(r) See also *Alexander v. Gardner*

(q) See particularly the judgment of Blackburn, J. (1835), 1 B. N. C. 671.

S. 20.

8. A. agrees to sell and deliver to B., at a distance, merchantable iron. The iron necessarily, to the knowledge of both, deteriorates by the transit. B. has agreed to bear the risk of necessary depreciation during transit, though A. agreed to deliver the iron at its destination. *Bull v. Robison* (1854), 10 Ex. 342.

Transfer of Title.

Sale by person not the owner.

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Provided also that nothing in this Act shall affect—

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.

S. 21 (1).

Subject to the provisions of this Act—i. e., ss. 22—26, 48 (2).

Non-disclosure by the seller of absence of title of which he is aware, is a fraud on the buyer (s).

Under the authority, or with the consent of owner.—That is, as agent or licensee, or otherwise, by virtue of a right under agreement, e. g., a pledgee selling under a power of sale; or a mortgagor allowed by the mortgagee to deal with the goods in the ordinary way of trade (t).

(s) Per Cur., in *Morley v. Attenborough* (1849), 3 Ex. 500, quoting Littledale, J., in *Early v. Garrett* (1829), 9 B. & C. 928, 932; and *Springwell v. Allen* (1649), Aleyn,

91; cited in 2 East, 448 (a); per Brett, L.J., in *Ward v. Hobbs* (1877), 3 Q. B. D. at p. 161.

(t) *Gough v. Wood & Co.*, [1894] 1 Q. B. 713.

Acquires no better title.—The maxim of the law is *nemo dat quod non habet* (u). In *Cole v. North Western Bank* (x), Blackburn, J., said: "At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt [s. 22], and an apparent exception where the person in possession had a title defeasible on account of fraud [s. 23]. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgee had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledgee with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bond fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it" [s. 21 (1)].

S. 21 (1).

Unless the owner . . . is by his conduct precluded—i. e., is precluded by virtue of an estoppel *in pais*. The rules relating to such estoppels are laid down in *Carr v. L. & N. W. Ry. Co.* (y), and may be shortly summarized as:—

Rules as to estoppels in pais.

- (1.) Wilful misrepresentation by words or conduct of a fact:
- (2.) Representation of a fact intended to be acted on:
- (3.) Representation by conduct of a fact, from which an invitation to act thereon would be inferred:
- (4.) Representation by culpable negligence of a fact, leading proximately to action thereon.

The provisions of the Factors Acts.—Defined by s. 62 (1) to mean the Factors Act, 1889 (which repealed all the previous Acts), the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

S. 21 (2) (a).

Or any enactment—e. g., the Bill of Lading Act, 1855; the Bills of Sale Act, 1878; the Bankruptcy Act, 1883, s. 44 (reputed ownership): see s. 61 (1) of this Act.

Special common law . . . power of sale—e. g., powers of pledgees (z), masters of ships acting in cases of necessity (a), sheriffs (b), &c.

S. 21 (2) (b).

(u) Per Willes, J., in *Whistler v. Forster* (1863), 14 C. B. N. S. 248, 257.

Holt, 383.

(a) *The Gratitude* (1801), 3 Rob. Adm. 240, 259.

(z) (1875), L. R. 10 C. P. at p. 362.

(b) *Anon.* (1579), Dyer, 363 (a);

(y) (1875), L. R. 10 C. P. 307.

and cases cited in Benj. p. 16, note (a).

(z) *Pothonier v. Dawson* (1816),

S. 21 (2) (b). **Statutory power of sale**—*e. g.*, sales by lessors of distress under 2 Will. & Mary, sess. 1, c. 5, s. 2, and 51 & 52 Vict. c. 21; sales by innkeepers under 41 & 42 Vict. c. 38; sales by mortgagees under s. 19 (1) of the Conveyancing Act, 1881; sales under distress for rates, tithes, &c.

Or under the order of a Court—*e. g.*, sales of perishable goods under Ord. 50, r. 2 (c); sales under Ord. 13, r. 13, &c.

S. 21 (1).

ILLUSTRATIONS.

1. B., a farmer, conveys to A., by bill of sale, amongst other things, all the growing crops and chattels and effects which were then or might be on B.'s farm. A. allows B. to continue in possession of the crops and to carry on his business. In the ordinary course thereof, B. sells C., who has no notice of the bill of sale, twelve quarters of wheat. B. has, by implication, a licence from A. to carry on his business in the ordinary way, and the sale to C. is good. *National Mercantile Bank v. Hampson* (1880), 5 Q. B. D. 177 (d).

2. A. sells to B. an unascertained quantity of 350 barrels of flour. C. makes advances to B. on the security of the flour, and obtains from him a delivery order on A., which C. lodges with A., who says, "All right," and shows C. samples of the flour sold to B. C. sells the flour to various persons, and some of it is delivered by A. A. is estopped as against C. from denying that the property in the flour, though unascertained, passed to B., and C. can bring trover for the residue. *Woodley v. Coventry* (1863), 2 H. & C. 164 (e).

Market overt. **22.**—(1.) When the goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

S. 22. This section is subject to the provisions of s. 24.

A sale of goods in market overt does not bind the Crown either at common law (f) or (according to the general rule of construction of statutes) under this Act. And if the original owner of the goods sold come afterwards into possession of them, his title revives (g).

(e) *Bartholomew v. Freeman* (1877), 3 C. P. D. 316; *The Hercules* (1885), 11 P. D. 10; *Annual Practice* (1894), pp. 317, 875.

(d) Cf. *Taylor v. McKeand* (1880), 5 C. P. D. 358, where the sale being out of the ordinary course of business

the licence was not duly executed.

(e) See also *Knights v. Whiffen* (1870), L. R. 5 Q. B. 660; *Stoveld v. Hughes* (1811), 14 East, 308.

(f) Co. 2 Inst. 713.

(g) Co. 2 Inst. 713.

By 1 Jac. 1, c. 21, s. 5, it was provided that "no sale or pawn of any goods . . . to any pawnbroker in London, Westminster, or Southwark, shall work any change of the property therein." This Act was repealed (so far as regarded the regulations of the business of pawnbroking) by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 4, and is now wholly repealed by the schedule to the present Act. (See schedule of repealed enactments, *post*.)

S. 22.

Where goods are sold "in market overt."—"Market overt in the country is held on special days provided by charter or prescription (*h*); but in London every day, except Sunday, is a market day (*i*). In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop (*j*) in which goods are exposed publicly for sale is market overt for such goods as the owner professes to trade in" (*k*). "London," in the above extract, means the City of London. Market overt is "an open, public, and legally constituted market" (*l*). It seems doubtful how far modern markets, established under parliamentary powers, constitute markets overt (*m*).

S. 22 (1).

In accordance with the above principles, there is no market overt, *e.g.*,

- (1) In a scrivener's shop, for plate (*n*);
- (2) In Smithfield, for clothes (*o*);
- (3) In Cheapside, for horses (*o*);
- (4) At Aldridge's, for carriages (*p*).

Furthermore, there must be a sale *in the market overt*. Such a sale requires "that the commodity should be openly sold and delivered in the market" (*q*). It is necessary that the goods be "exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market, so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them and prevent their being sold" (*r*).

(*h*) See *Benjamin v. Andrews* (1858), 5 C. B. N. S. 299.

(*i*) Case of market overt, 5 Rep. 83 b; and other cases in Benj. p. 8, note (*f*).

(*j*) Not a wharf: *Wilkinson v. King* (1809), 2 Camp. 335.

(*k*) Benj. p. 8; 5 Co. 83. See generally, Bac. Ab. Fairs and Markets (E).

(*l*) *Lee v. Bayes* (1856), 18 C. B. 599; *Benjamin v. Andrews*, *supra*.

(*m*) Cf. per Cockburn, C.J., in *Mayes v. Newington* (1878), 4 Q. B. D. at p. 34, with *Ganley v. Ledwidge* (1876), Ir. R. 10 C. L. 33, 133.

(*n*) 5 Rep. 83 b.

(*o*) Moore, 360.

(*p*) *Marner v. Banks* (1867), 17 L. T. N. S. 147.

(*q*) Per Mansfield, C.J., in *Hill v. Smith* (1812), 4 Taunt. 532.

(*r*) Per Cockburn, C.J., in *Crane v. London Docks Co.* (1864), 5 B. & S. 313.

S. 22 (1).

Therefore, a sale by sample in market overt, the delivery not taking place there, nor the goods being there, is ineffectual to pass the property (s). So also if the treaty for the sale began out of market overt (t).

According to the usage of the market.—Thus “the buyer is not protected if the sale be made in a covert place, as a back room, warehouse, or shop with closed windows, or between sunset and sunrise (u); or if the treaty for sale be begun out of market overt” (x).

As regards the particular place of the sale, “it is impossible, upon a careful perusal of the scanty authorities upon the subject, not to see that there is a certain element of publicity required in the transaction to bring it within the principle of a sale in market overt. The market, to be a market overt, must be an open, public, and legally constituted one (y). The shop in London must be one in which goods are openly sold; that is, when they are sold in the presence and sight of any one of the public who may come into the shop upon legitimate occasion” (z).

Sale to a shopkeeper in the city of London.

With respect to sales, not *by*, but *to*, a shopkeeper in the city of London, a doubt was expressed in *Crane v. London Docks Co.* (z), *supra*, whether the privilege of market overt was extended thereto. It would seem, *prima facie*, that a sale *to* a shopkeeper is not in accordance with the common usage of market overt. In *Lyons v. De Pass* (a) the question was not raised, and in the latest case on the point (b) the question was again left undecided, though an opinion was expressed that the sale was not within the privilege. Wills, J. (after quoting Lord Coke (c), that “every shop in London is a market overt for such things only which, by the trade of the owner, are put there to sale”; and Blackstone (d), to the effect that the goods in the shop must be “exposed publicly,”) proceeds (e):—“When a casual person, having jewellery for sale, goes into a jeweller’s shop to sell it, if he can, to the jeweller, it seems to me that the goods so offered for sale to the one person who is carrying on the business in that shop, are neither ‘put there to sale’ nor ‘exposed publicly to

(s) *Hill v. Smith* (1812), 4 Taunt. 532; and *Crane v. London Docks Co.* (1864), 5 B. & S. 313; *Newtownards Comms. v. Woods* (1877), Ir. R. 11 C. L. 506.

(t) Co. 2 Inst. 713.

(u) Co. 2 Inst. 714.

(x) Benj. p. 9; 5 Co. 83.

(y) Per Jervis, C.J., in *Lee v. Bayes* (1856), 18 C. B. 601.

(z) Per Wills, J., in *Hargreave v. Spink*, [1892] 1 Q. B. at p. 26; 61 L. J. Q. B. at p. 318.

(a) (1840), 11 A. & E. 326. See also *Taylor v. Chambers* (1605), Cro. Jac. 68.

(b) *Hargreave v. Spink*, *supra*.

(c) 5 Rep. 836.

(d) 2, 449.

(e) *Hargreave v. Spink*, *supra*, at pp. 28, 31.

sale,' expressions which seem to me to point to goods placed in the shop, by or with the consent of the shopkeeper, for sale to all persons prepared to buy." Then, after referring to (*inter alia*) the statute 1 Jac. 1, c. 21, s. 5 (repealed by this Act), as *some* evidence that sales to shopkeepers were within the privilege, he says: "The custom is a general one, applicable to all sorts of shops, and it might therefore be expected naturally to deal only with a state of things common to at least the great majority of shops." It is apprehended that this rule of market overt does not cover sales other than those by a shopkeeper.

S. 22 (1).

Provided, &c.—"A sale in market overt does not . . . protect a buyer who knew they [the goods] were not the property of the seller, or was guilty of bad faith in the transaction" (*f*).

In good faith is defined in s. 62 (2) as "honestly, whether . . . negligently or not."

The law relating to the sale of horses.—The provisions of the statutes 2 & 3 P. & M. c. 7 (in 1555), and 31 Eliz. c. 12 (in 1589), relating to the sale of horses, are set out in the Appendix of Statutes at the end of this work. See also Bac. Ab. "Fairs and Markets," and Com. Dig. "Market." The more modern cases are referred to in the note (*g*).

S. 22 (2).

The provisions of this section do not apply to Scotland.—The English law as to sales in market overt has never obtained sanction in Scotland (*h*).

S. 22 (3).

ILLUSTRATIONS.

S. 22.

1. Stolen jewellery is sold by A. to B. in a show-room above B.'s shop, to which the public had access only on permission. This is not a sale in market overt, because—(1) the place of sale is not the open shop; (2) (probably) because the sale is not *by*, but *to*, B. *Hargreave v. Spink*, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318.

2. B., who carries on at one shop the business of drug merchant, and at another that of oil and colourman, buys from A. at the first shop, by sample, stolen opium. The bulk is delivered at the other shop. This is not a sale in market overt of the opium, as (1) the bargain only took place at a shop which is an open market for opium and the delivery elsewhere; (2) (probably) because B. was the buyer, and not the seller, of the opium. *Crane v. London Docks Co.* (1864), 5 B. & S. 313.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to

Sale under voidable title.

(*f*) Benj. p. 9, quoting Co. 2 Inst. 599; *Moran v. Pitt* (1873), 42 L. J. 713. Q. B. 47.

(*g*) *Joseph v. Adkins* (1817), 2 Stark. 76; *Lee v. Bayes* (1866), 18 C. B. (*h*) Bell's Comm. ss. 527, 1320.

S. 23.

the goods, provided he buys them in good faith and without notice of the seller's defect of title.

The seller has a voidable title—i.e., voidable by reason of (*inter alia*) any of the invalidating causes mentioned in s. 61 (2).

This section re-enacts the well-known rule of law which is thus stated by Lord Cairns (i):—"By the law of our country, the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. [But] if it turns out that the chattel has come into the hands of the person, who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, then the purchaser will obtain a good title, even though afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced" (j).

The above rule is only an instance of the general principle that, where one of two innocent parties must suffer by the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud (k).

The seller's title accordingly must be "voidable," and not "void." In the former case a new act is requisite to avoid the title acquired under the transaction, and until such avoidance a sub-buyer is protected. In the latter case, the transaction is void *ab initio*, and there are no rights or title arising thereunder which can be transferred to the sub-buyer. "We must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*, induced by fraudulent devices on his part. In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case. In the former case the contract is *voidable* at the election of the seller, not void *ab initio*. It follows, therefore, that the seller may affirm and enforce it, or may rescind it" (l). In the latter case we have "to deal

(i) In *Cundy v. Lindsay* (1878), 3 Ap. Ca. at p. 463.

(j) See also *Babcock v. Lawson* (1879), 4 Q. B. D. 394, affirmed 5 Q. B. D. 284; *White v. Garden* (1851), 10 C. B. 919.

(k) *Babcock v. Lawson*, *supra*.

(l) Benj. p. 412. See *Attenborough v. London & St. Katherine Docks Co.* (1878), 3 C. P. D. 450; *Babcock v. Lawson* (1880), 4 Q. B. D. 394. The principle is also clearly stated in

with a case which ranges itself under a completely different chapter of law—the case, namely, in which the contract never comes into existence” (*m*), and “where the possession does not pass by contract, but by wrong, and is trespassory” (*n*).

S. 23.

His title has not been avoided.—In *Clough v. London and North Western Ry. Co.* (*o*), the principles relating to a seller’s election to affirm or avoid the voidable transaction were laid down as follows (*p*):—

- (1) A seller has the right of election at any time after his knowledge of the fraud, and until he expressly or impliedly affirms the contract;
- (2) So long as he does not affirm he may keep the question open, subject to the rights of a *bond fide* sub-buyer intervening;
- (3) A seller may make his election by plea, and is not bound to any antecedent act *in pais*.

And the avoidance of the contract takes effect by virtue of the seller’s determination of his election, and from the time of communication thereof to the other party (*q*).

Cases which represent the principle laid down in this section may also, it would seem, fall under s. 25 (2), *infra*, which protects sub-sales by buyers, in possession of the goods or documents, to persons who buy in good faith and without notice “of any lien, or other right of the original seller in respect of the goods.”

The present section says, “notice of the seller’s defect of title.” There seems no reason why a “right in respect of the goods,” under s. 25 (2), should not include a right to resume possession of them by avoidance of the contract under this section, in a case where the buyer has, under the former section, “bought” the goods (*r*); but s. 25 (2) would not apply (whereas the present section would) to any case where the goods had not been delivered.

ILLUSTRATIONS.

1. A. sells iron to B., who pays him by a bill drawn upon a fictitious person. B. then re-sells to C., and A. then repudiates the contract.

Kingsford v. Merry (1856), 11 Ex. 577; and the distinction between the two classes of cases is well shown in the American case of *Edmunds v. Merch. Despatch Trans. Co.*, 135 Mass. 283.

(*m*) *Cundy v. Lindsay* (1878), 3 Ap. Ca. at p. 466. Other cases are *Higgins v. Burton* (1857), 26 L. J. Ex. 342, and *Hardman v. Booth* (1863), 1 H. & C. 803.

(*n*) Pollock & Wright on Poss., p. 254.

(*o*) (1871), L. R. 7 Ex. 26.

(*p*) See Benj. p. 421.

(*q*) Benj. p. 422, quoting *Reese River Mining Co. v. Smith* (1869), L. R. 4 H. L. 64.

(*r*) See *Lee v. Butler*, [1893] 2 Q. B. 318; *Helby v. Matthews*, [1894] 2 Q. B. 262; see per Smith, L.J., at p. 269.

S. 23. C. has the ownership of the iron. *White v. Garden* (1851), 10 C. B. 919.

2. B. orders goods of A., signing his name so as to resemble the signature of C., a well-known tradesman, but giving his own address. A. sends the goods to B.'s premises invoiced to C., whose address he does not know. B. re-sells to D. D. is liable to A. for the conversion of the goods, as—the contract between A. and B. being void, as A. never intended to deal with B.—no ownership of the goods passed to B. *Cundy v. Lindsay* (1878), 3 Ap. Ca. 459.

Revesting of property in stolen goods on conviction of offender.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

S. 24 (1). This section is based upon the 24 & 25 Vict. c. 96 (the Larceny Act, 1861), s. 100 (included in the Appendix of Statutes, *post*, p. 323), which re-enacted and amplified the 7 & 8 Geo. 4, c. 29, s. 57, which latter statute, for the first time, extended the law as to restitution to cases of false pretences. The earlier statute, 21 Hen. 8, c. 11, only applied to goods *stolen*, and the law under the present section is now as it was under the statute of Hen. 8, by virtue of sub-s. 2 hereunder.

The effect of the section may be shortly summarized as follows:—

- (1.) On the conviction of the *thief*, the property revests in the original owner: [sub-s. 1]
- (2.) *Secus*, on the conviction of the offender by other means than larceny: [sub-s. 2]
- (3.) Where the property does not pass to the person in possession of the goods, the Act is not required; *e. g.*, when the goods are sold to him *out of market overt*; or if,

as in *Cundy v. Lindsay* (s), there was no contract of sale with him at all (t). S. 24 (1).

And the offender is prosecuted to conviction.—The policy of the law was that owners of stolen goods should be encouraged, on grounds of public policy, to prosecute the offender. “The legislature thought that, for the general public benefit, they ought to prefer the original owner [i. e., to the sub-buyer], if he prosecuted the thief to conviction, but only in that case” (u). Thus, the 21 Hen. 8, c. 11, laid down the condition that the conviction should be “by reason of evidence given by the party so robbed.” So, also, the 7 & 8 Geo. 4, c. 29, s. 57, says: “To encourage the prosecution of offenders, be it enacted that, on indictment by or on behalf of the owner . . .” And the Larceny Act says, “by or on behalf of the owner of the property, or his executor or administrator.”

It will be noticed that no such words, or similar words, are to be found with reference to *prosecution* in this section; and it would seem that the condition, that the owner or his representative should prosecute the thief, contained in the Larceny Act, is repealed by implication. Though both this Act and the Larceny Act, 1861, are affirmative statutes, and therefore *prima facie* not inconsistent with each other, yet it is difficult to see a greater inconsistency than that of a proposition stated *simpliciter* (as in this Act), as compared with a similar proposition in the earlier Act stated only *sub modo* (v).

The property in the goods so stolen.—Though all the statutes dealing with this subject only provided that the “goods” or “the property” should be “restored” to the owner, yet it has been long decided that these words mean the “right of property” in the goods, and that such property reverted even without an order of restitution (x). And it was early decided, even before the Larceny Act, that the proceeds of the goods could be restored, as well as the goods themselves (y). The Larceny Act itself, moreover, includes the “proceeds” in the term “property” in the interpretation clause (z).

(s) (1878), 3 Ap. Ca. 459.

(t) Per Esher, M.R., in *Vilmont v. Bentley* (1887), 18 Q. B. D. at pp. 326, 328.

(u) Per Lord Esher, M.R., in *Vilmont v. Bentley*, *supra*, at p. 327.

(v) See, for this principle of construction, the judgments in *Bank of England v. Vagliano*, [1891] App. Ca. pp. 130, 160.

(x) Per Buller, J., in *Horwood v. Smith* (1788), 2 T. R. at p. 756; *Scattergood v. Sylvester* (1850), 15 Q. B. 506; *Bentley v. Vilmont* (1887), 12 Ap. Ca. 471.

(y) Lofft, 88; Noy, 128; Cro. El. 661.

(z) See *Reg. v. Justices of Central Criminal Court* (1886), 17 Q. B. D. 598.

S. 24 (1).

It is apprehended that the word "goods" would still include "proceeds," as under the Larceny Act.

Reverts.—That is to say, in cases where the property has passed to the person in possession of the goods. When the property has not passed, the Act is not required. Thus, a person who has purchased *out of* market overt goods which the owner claims of him is liable in trover if he afterwards resell them, although before the conviction of the thief (*a*).

The property reverts *on the conviction* of the offender (*b*). Consequently, an innocent buyer in market overt, who had parted with the goods before the conviction, is not liable in trover to the original owner (*c*). But, if they were in his possession at the date of the conviction, and he was compelled to give them up, he could not counter-claim for their keep previous to conviction, as he was then keeping his own property (*d*).

Sub-s. 1 applies to the case of a factor, and, on his conviction, a title acquired from him is divested (*e*).

Notwithstanding any intermediate dealing.—As, *e. g.* (in addition to sale), a pledge to a pawnbroker. S. 30 of the Pawnbrokers Act of 1872, deals with the restitution of goods feloniously taken and subsequently pledged.

ILLUSTRATIONS.

1. B. steals A.'s cow, and sells it to C. in market overt. B. is afterwards convicted of the larceny, and A. demands the cow of C., who refuses to deliver it. A. may recover against C. in trover, and no restitution order is necessary. *Scattergood v. Sylvester* (1850), 15 Q. B. 506.

2. B. steals A.'s sheep, and sells them in market overt to C. A. gives notice to C. of the theft, and C. re-sells the sheep. B. is then convicted of larceny. C. is not liable to A. in trover, as he did not have the sheep in his possession at the time of B.'s conviction, at which time only A.'s property reverted. *Horwood v. Smith* (1788), 2 T. R. 750.

S. 24 (2).

Wrongful means not amounting to larceny.—This sub-section alters the law as laid down in *Bentley v. Vilmont* (*f*), which decided that the 24 & 25 Vict. c. 96, s. 100, applies to cases of false pretences the same law as is applicable to the larceny of goods. In both cases the property was held to revert in the original owner on the conviction of the offender. This decision was come to with regret, and was based on the wording of the

(*a*) *Peer v. Humphrey* (1835), 2 A. & E. 495. See also *Cundy v. Lindsay* (1878), 3 Ap. Ca. 459.

(*b*) Per Buller, J., in *Horwood v. Smith* (1788), 2 T. R. 750; per Lord Bramwell, in *Bentley v. Vilmont* (1887), 12 Ap. Ca. at p. 480.

(*c*) *Horwood v. Smith*, *supra*.

(*d*) *Walker v. Matthews* (1881), 8 Q. B. D. 109.

(*e*) *R. v. Woollez* (1860), 8 Cox, Cr. Cas. 337.

(*f*) (1887), 12 Ap. Ca. 471.

Act. In future, the cases will fall under two heads:—(1) Cases of what Lord Esher, M.R. (g), calls “bare false pretences,” i.e., where the property does not pass on a *de facto* contract from the original owner, and in which, consequently, his common law rights are left unimpaired; (2) “Cases of false pretences which lead to a contract of sale” (g), in which, in fact, the offender has a *voidable* title, which he can transfer absolutely under s. 23, and also (it is apprehended), where there is delivery, under s. 25 (2). An instance of the latter case was *Moyce v. Newington* (h), which is now (though overruled in *Bentley v. Vilmont*) good law by virtue of the Act. S. 24 (2).

Notwithstanding any enactment to the contrary.—See the Larceny Act (24 & 25 Vict. c. 96), s. 100, and the Summary Jurisdiction Act (42 & 43 Vict. c. 49), s. 27. These sections are accordingly repealed so far as they allow the reversion of the property in goods obtained otherwise than by larceny; and the law now is as it was under the first statute, the 21 Hen. 8, c. 11.

It is apprehended that by the use of the words “by reason only of the conviction” the Legislature intended to preserve the right of the Court to order restitution of the goods obtained, where restitution would be just; as, e.g., when the offender or his agent was still in possession (i), or no third person had acquired a good title from him; and, perhaps, even where a third person has obtained a good but voidable title. “The order of restitution is cumulative to the ordinary remedy by action” (k), the former being in the discretion of the Court (l).

Provisions . . . do not apply to Scotland.—For the law of Scotland, see Bell’s Prin. ss. 527, 1320; 1 Bell’s Illustr. pp. 417, 418; Bell on Sale, p. 80. S. 24 (3).

ILLUSTRATIONS.

1. B. buys sheep of A., and gives in payment a cheque on a bank where he has no account, and afterwards resells to C., a *bona fide* buyer without notice. A. afterwards retakes the sheep from C.’s farm. B. is subsequently convicted of obtaining the sheep from A. by false pretences. C. may recover in trover from A. for the conversion of the sheep, as the property vested in C. was not reversioned by B.’s conviction. *Moyce v. Newington* (1878), 4 Q. B. D. 32 (m).

2. B. obtains, by false pretences, from A. goods which he pawns to C., who deposits them with D., in the City of London, for sale. E. buys them of D. B. is afterwards convicted of false pretences. A. is [not] entitled to recover the goods from E., as E.’s property is not divested by B.’s conviction. *Bentley v. Vilmont* (1887), 12 Ap. Ca. 471.

(g) *Vilmont v. Bentley* (1886), 18 Q. B. D. at p. 328. *Bentley, supra*, at p. 327. At the C. C. C. on July 24, 1894, the Common

(h) (1878), 4 Q. B. D. 32.

(i) *Reg. v. Justices of Central Criminal Court* (1886), 18 Q. B. D. 314. Serjeant granted a restitution order on a conviction for false pretences: see Law Journal, 28 July, 1894, p. 460.

(k) Per Pattison, J., in *Scattergood v. Sylvester* (1850), 15 Q. B. 506. (m) See *Parker v. Patrick* (1793), 5 T. R. 175, to same effect. This case was under the 21 Hen. 8, c. 11.

(l) Per Esher, M.R., in *Vilmont v.*

S. 25.

Seller or
buyer in pos-
session after
sale.

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term “mercantile agent” has the same meaning as in the Factors Acts.

S. 25 (1).

Where a person having sold goods, &c.—This sub-section reproduces s. 8 of the Factors Act, 1889 (see Appendix of Statutes, *post*, p. 327), *verbatim*, save for the omission after the words “other disposition thereof” of the words “or under any agreement for sale, pledge, or other disposition thereof.” S. 8 of the Factors Act, 1889, in its turn, substantially reproduced s. 3 of the Factors Act, 1877 (40 & 41 Vict. c. 39), but extended its operation to the possession of goods as well as of documents, and required that the disposition should be executed by delivery or transfer. The effect of the clause is to extend the doctrine of ostensible ownership to the particular case of a seller “who continues or is in possession of the goods or of the documents of title” thereto,

and to confer a good title upon a *bond fide* second buyer or pledgee, who has obtained a legal title from the original seller by the delivery or transfer of the goods or documents of title (n). The particular case of a seller, who remained in possession of goods sold, and who afterwards dealt with them in *fraud* of the original buyer, was not provided for, either at common law or under the three earliest Factors Acts(o). At common law, the doctrine of estoppel applied only when the owner of goods had *acted* so as to clothe the seller with apparent authority to sell or pledge them, and not, as in the present case, when the owner had only remained *passive*; and the three earliest Factors Acts were expressly confined to the case of an "agent intrusted with the goods," whereas a seller did not fall within that definition (p). The point arose for decision in 1877, in *Johnson v. Crédit Lyonnais Co.* (q), where the original buyer was held entitled to recover goods in the hands of an innocent pledgee, to whom the seller had *fraudulently* pledged the goods, and transferred the documents of title. The Factors Act of the same year (40 & 41 Vict. c. 39), was passed with the object (*inter alia*) of annulling the effect of this decision (r). Although this sub-section is probably intended to apply only to the case of a *fraudulent* dealing by the original seller with the goods or documents of title, as in the case above quoted, yet it is submitted that it is wide enough in its terms to include the case of an unpaid seller, who, retaining possession of goods, wrongfully re-sells them, *e.g.*, by an unjustifiable exercise of his lien under s. 48 (2), and its effect is to confer a good title upon a second *bond fide* buyer as against the original buyer, even although the latter may not be in default at the time of the re-sale. See the notes to s. 48 (2), *post*, p. 266.

S. 25 (1).

That this sub-section will be construed according to the natural and ordinary meaning of the words, and not limited to cases of *fraudulent* transfers by the seller, appears the more probable from the fact that sub-s. 2 has already received judicial interpretation in this spirit(s). In the cases quoted in the note, sub-s. 2 was held to apply to a sale or pledge by the buyer of non-mercantile goods like furniture, in his possession under a "hire and purchase" agreement. Where, however, the sale is by the seller's

(n) Under s. 3 of the Factors Act, 1889, a *pledge* of the documents of title is equivalent to a pledge of the goods.

(o) 4 Geo. 4, c. 83 (Factors Act, 1823); 6 Geo. 4, c. 94 (Factors Act, 1825); 5 & 6 Vict. c. 39 (Factors Act, 1842).

(p) *Johnson v. Crédit Lyonnais* (1877), 3 C. P. D. 32.

(q) 2 C. P. D. 224; *S.C.* on appeal, *supra*.

(r) See s. 3 of that Act.

(s) In *Lee v. Butler*, [1893] 2 Q. B. 318; 62 L. J. Q. B. 591; *Helby v. Matthews*, [1894] 2 Q. B. 262.

S. 25 (1). *mercantile agent*, it is possible that this fact may affect the character of the goods sold. See *post*, p. 164.

For the definitions (under both sub-sections) of "*goods*," "*documents of title*," "*delivery*," see s. 62 (1); and of "*in good faith*," see s. 62 (2); and for the definition of "*possession*," see Factors Act, 1889, s. 1 (2), Appendix of Statutes, *post*, p. 325; and of "*person*," see Factors Act, s. 1 (6), and Interpretation Act, 1889, s. 19. See further, with regard to documents of title, s. 47, *post*, and the notes thereon.

Sub-s. 1 may be shortly stated as follows:—

The seller of goods may, as if under an express authority from the owner—*i. e.*, the buyer—sell, pledge, &c. the goods or documents of title, if—

- (1.) He be in possession of such goods or documents:
- (2.) The second sale, &c. be executed by delivery or transfer of the goods or documents:
- (3.) The second buyer, &c. act in good faith and without notice of the previous sale.

It is proposed to consider (1) the necessary conditions, (2) the effect of the transaction.

(1) The necessary conditions.

(i) Seller in possession of goods or documents.

Continues or is in possession.—The *first* condition is that the seller must be in possession of the goods or documents, *i. e.*, he must have the *indicia* of ownership. It is important to observe that this sub-section, following s. 3 of the Factors Act, 1877, applies not only where the seller has been left by the buyer in possession of the goods or documents of title, but also where the seller has got possession of them *after* the sale (*t*), the words being "*continues or is in possession*." Furthermore, the seller may act if he be in possession of *the goods*. S. 3 of the Factors Act, 1877, applied only when the seller's possession was of the *documents*. There is this important distinction between the two cases. When the goods are represented by a document of title, the buyer, who finds it convenient or necessary in the course of business to leave the document in the seller's possession, may secure himself against any subsequent fraudulent disposition on the part of the seller, by having the document specially indorsed to himself, and, when the goods are in the possession of a wharfinger or warehouseman, by having the goods entered in his (the buyer's) name. On the other hand, when the actual goods are left in the seller's possession, it will be necessary for the buyer so to earmark the particular goods sold—*e. g.*, by having them marked with his name—as to prevent the seller continuing to be the ostensible

(*t*) As in *Stephens v. Wilkinson Cowasjee* (1866), L. R. 1 P. C. 127. (1831), 2 B. & Ad. 320; *Page v. See Benj.* pp. 798—802.

owner. In some cases this may be a matter of difficulty; and the buyer may be able to protect himself, only by obtaining an immediate delivery of the goods. S. 25 (1).

The delivery or transfer.—The *second* condition is that the transaction should be *executed*. In this respect this sub-section differs from s. 3 of the Factors Act, 1877. That section, though possibly the result may not have been intended, applied not only where the second buyer or the pledgee had the document of title transferred to him, but also when the disposition was made without any transfer of the document; the only condition precedent to a valid sale, &c. of the *goods or documents* laid down by that section being that the seller should be in possession of *the documents*. Consequently, a person dealing with the seller with regard to the goods might have been even ignorant that the document was in the hands of the latter. The amendment of the law is important, as there seems no reason why the title of the second buyer or of the pledgee, who has not obtained possession of the goods or documents, should be preferred to that of the first buyer; on the contrary, the maxim "*Qui prior est tempore potior est jure*" should apply when neither party has acquired a legal title. (ii) The transaction must be executed.

Sale, pledge, or other disposition.—And the transaction to which validity is thus given is "*a sale, pledge, or other disposition*" of the goods, &c. The first two terms speak for themselves. "Other disposition" was, under the Factors Act of 1825, judicially interpreted as meaning some transaction of the nature of a sale or pledge, the legislature not intending to protect any dealing substantially different therefrom (*u*). S. 5, however, of the Factors Act, 1889, allows a mercantile agent in possession under s. 2 (1) of that Act to sell or pledge in consideration of the delivery or transfer of other goods or documents; in other words, allows him to barter the goods of his principal, which he could not do at common law. If s. 5 of the Factors Act is to be read with s. 25 (1) of this Act, effect may be given to the phrase "other disposition" by reference to the transaction of exchange, although this Act does not directly apply to exchange of goods (*v*).

By that person, or by a mercantile agent.—The person making

(*u*) *Taylor v. Kymer* (1832), 3 B. & Ad. 320; *Taylor v. Trueman* (1830), 1 M. & M. 453; and see the notes to s. 47, *post*, p. 257.

(*v*) In *Shenstone v. Hilton*, [1894] 2 Q. B. 452, a case decided while this

work was passing through the press, the term "other disposition" under s. 9 of the Factors Act was held to include a delivery of goods to an auctioneer for the purpose of sale.

S. 25 (1). the delivery or transfer may be the seller or his mercantile agent. So far as dispositions by the seller are concerned, no doubt the authority of *Lee v. Butler* (x), decided under sub-s. 2, would apply, and a sale or pledge of such goods, as furniture in a private house, i.e., non-mercantile goods, would be valid. Kay, L.J., in the case in question, pointed out that the definition of "goods" in the Factors Acts included more than "wares and merchandise," and the definition in s. 62 (1) of this Act is equally wide. The earlier Factors Acts, on the contrary, dealt only with mercantile transactions (y).

But when the seller acts through his agent, the latter must be, according to the express provision of the Act, a "mercantile" one. A mercantile agent is defined by s. 1 (1) of the Factors Act, 1889 (incorporated by sub-s. 3 of this section), as "a mercantile agent having in the customary course of his business as such agent authority either to sell, &c." "The Act applies," says Mathew, J. (z), "only to persons of the class ordinarily carrying on the business of mercantile agents." Accordingly, (1) under the express provisions of this Act, no sale or pledge by the seller's non-mercantile agent would pass a good title; (2) it is submitted that the goods disposed of by the agent must be more or less goods as understood in commerce; in other words, the agent must also be a mercantile agent *quod* the class of the goods dealt with. The above definition speaks of his authority "in the customary course of his business," and s. 2 of the same Act provides that he should be "acting in the ordinary course of business of a mercantile agent" (a). Both sections appear to contemplate the case of an agent having an authority which is derived from previous dealings with the particular class of goods.

If this view be the correct one, it would seem that the word "goods" must receive a wider or a narrower interpretation, according as the sale or pledge is made by the seller himself or his agent. When the goods are in the possession of a mercantile agent, the editors submit that the goods dealt with by him must be such goods only as, in the ordinary course of his business, he is accustomed to dispose of. And the distinction between the two cases is not unreasonable, as, the object of the Factors Act being to extend the doctrine of ostensible ownership, the character of the person dealing with the goods should conform as closely as possible to that either of an owner, or of an agent having ostensibly plenary authority to dispose of them.

(x) [1893] 2 Q. B. 318.

(y) Benj. p. 19.

(z) In *Hastings v. Pearson*, [1893] 1 Q. B. 62, under ss. 1, 2, of Factors

Act, 1889.

(a) See on these words, *Hastings v. Pearson*, *supra*.

S. 25 (1).

A question may here arise whether ss. 4 and 5 of the Factors Act, 1889, are incorporated with ss. 8 and 9, the "seller and buyer" sections of that Act, *i.e.*, with s. 25 of this Act. Lord Esher, M.R., in *Lee v. Butler* (b), appears to treat these sections as independent of the rest of the Factors Act, and so they logically are. But in that case no mercantile agent was employed; and the difficulty springs from the use of the term in this section. If s. 4 of the Factors Act is incorporated with the "seller and buyer" sections, then the seller's mercantile agent, pledging for an antecedent debt of the agent's, would divest the buyer's rights only to the extent of the agent's lien. So, if s. 5 of the Factors Act is incorporated, the pledge would be good only to the extent of the goods taken in exchange. It is also doubtful whether such a transaction as last mentioned may not be "a disposition" under the express words of the present section: see p. 163, *supra*.

In good faith and without notice.—The *third* condition is the good faith of, and absence of notice in, the second buyer or pledgee.

(iii) The second buyer, &c., must act in good faith and without notice of previous sale.

"In good faith" is defined in s. 62 (2) as "honestly, whether . . . negligently or not."

"Notice" here probably means knowledge, actual or imputed, as in the case of a negotiable security, or under the Bankruptcy Acts. "Notice and knowledge," says Parke, B., in *May v. Chapman* (c) (a case of a bill), "means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." And Lord Bramwell says, in *Sheffield v. London Joint Stock Bank* (d), "Notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that enquiry should be made into such title." See further the cases in the note (e).

Meaning of notice.

The second buyer or pledgee may then be fixed with notice of the earlier sale either (1) *directly*, from communication, or from the fact of the goods being marked or otherwise appropriated to the first buyer, or from the document of title itself, when the goods are transferred by means of a document; for the subsequent disposition will be valid only when it appears on the face of the document that the goods are deliverable to the seller; or (2) *indirectly*, from knowledge of circumstances which would

(b) [1893] 2 Q. B. 318.

(c) (1847), 16 M. & W. 355, 361, followed by Willes, J., in *Raphael v. Bank of England* (1855), 17 O. B. 161; *Jones v. Gordon* (1877), 2 Ap. Ca. 125.

(d) (1888), 13 App. Ca. at p. 346.

(e) Factors Act, *Navulshaw v. Brownrigg* (1852), 2 De G. M. & G. 441; Bankruptcy Acts, *Ex parte Snowball* (1872), 7 Ch. Ap. 549; question for jury, *Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ap. 140.

S. 25 (1). lead a reasonable man of business to the conclusion that a sale of the goods had already taken place (*f*).

(2) The effect of the transaction.

Shall have the same effect as if.—When the necessary conditions, as above stated, have been duly fulfilled, the transaction is to “*have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same;*” that is to say, that person is treated as the buyer’s mercantile agent under s. 2 of the Factors Act, 1889, that being the authority of such an agent under that section.

ILLUSTRATION.

A. sells tobacco lying in bond in his name to B. B. pays the price, but leaves the tobacco in bond in A.’s name, and the documents of title thereto in A.’s hands. A. fraudulently pledges the documents of title to C., who receives them in good faith and without notice of the previous sale. C. has a good title to the tobacco as against B. See *Johnson v. The Crédit Lyonnais* (1877), 3 C. P. D. 32.

S. 25 (2).
Dispositions by a buyer.

Where a person having bought or agreed to buy goods, &c.—This sub-section reproduces *verbatim*—save with the omission after the words “or other disposition thereof,” of the words “or under any agreement for sale, pledge, or other disposition thereof”—s. 9 of the Factors Act, 1889, which in its turn substantially reproduced s. 4 of the Factors Act, 1877, with this difference, that it applied to the possession of the goods as well as of the documents; and added the further conditions, that such possession should be “with the seller’s consent,” and that the sale, pledge, or other disposition should be *executed* by the delivery or transfer of the goods or documents to the second buyer or the pledgee.

The sub-section provides for the case—the converse of that provided for by the preceding sub-section—of a buyer allowed by the seller to obtain possession of the goods sold or of the documents of title thereto; and it confers upon a *bond fide* buyer, or pledgee who obtains a legal title from the original buyer, a good title as against the original seller. The three earliest Factors Acts did not provide for this case, and under them it was held that “an agent entrusted” did not include a buyer, because he held, not as agent, but in his own right (*g*).

Having bought or agreed to buy.—A person may be a buyer under this sub-section, though the contract under which he has obtained possession is unenforceable under s. 4 of this Act. All

(*f*) *Evans v. Trueman* (1830), 1 Moo. & Rob. 10, per Lord Tenterden; as to “constructive” notice, see *Kaltenbach v. Lewis* (1883), 24

Ch. D. 54.

(*g*) See *Jenkyns v. Darborne* (1844), 7 M. & G. 678; *Van Casteel v. Booker* (1848), 2 Ex. 691.

that is necessary is a *de facto* contract of sale, and possession taken with consent under it (*h*). "The intention is," says Bowen, L.J., "to enable intending purchasers to deal freely and boldly with persons claiming to be vendees of goods who are in possession of the documents of title to the goods [or of the goods]. The section . . . is dealing with the mercantile rights of the parties as resulting from the original contract, apart from any question of proof or procedure in an action on the contract." And an "agreement to buy" is none the less within this sub-section, though the contract may be subject, in the buyer's favour, to a *defeasance*, as when he has the option to return the goods (*i*).

S. 25 (2).

It should be noticed that sub-s. 2 gives to the buyer the same rights whether he has bought, or only agreed to buy, the goods, whereas under sub-s. 1 the seller has no similar rights unless he has "sold" the goods. "It is evident that this section [*i.e.*, s. 9 of the Factors Act, 1889] contemplates both a seller, who has sold or agreed to sell, as also a buyer, who has bought or agreed to buy; for there cannot be a buyer who has 'bought or agreed to buy,' which are the words of the section, without there also being a seller who has sold or agreed to sell" (*k*). The corresponding words with regard to the seller are here omitted, because "it is the acts of the person who has bought or agreed to buy with which the section is dealing" (*l*).

The necessary conditions precedent to the validity of the buyer's disposition are:—

(1) The necessary conditions.

- (1.) Possession of goods, &c. with the seller's consent :
- (2.) Execution of the transaction by delivery or transfer of the goods or documents :
- (3.) Good faith, and absence of notice to the second buyer or the pledgee.

Obtains . . . possession of the goods or the documents of title.— (i) Possession of the goods or documents.

The *first* condition is that the buyer must obtain possession. As the possession of the goods *ipso facto* divests the seller's lien, this sub-section would be (so far as regards the lien) nugatory, unless it be treated as applying to cases where the buyer obtains possession of the goods as the seller's bailee "for a special purpose, or in a character different from that of buyer" (*m*).

(*h*) *Hugill v. Masker* (1889), 22 Q. B. D. 364.

(*i*) *Helby v. Matthews*, [1894] 2 Q. B. 262.

(*k*) Per Smith, L.J., in *Helby v. Matthews*, [1894] 2 Q. B. at pp. 268, 269.

(*l*) Per Lord Esher, M.R., *ibid.* at p. 266.

(*m*) Benj. p. 817, quoting *Tempest v. Fitzgerald* (1820), 3 B. & Ad. 680; *Marvin v. Wallace* (1856), 6 E. & B. 726; *Reeves v. Capper* (1838), 5 B. N. C. 136.

S. 25 (2).

For a similar reason, the "other right" of the seller cannot in such a case be a right of stoppage in transit.

S. 25 (2) compared with s. 47.

With regard to the buyer's possession of the document of title, this sub-section should be read in connection with s. 47, which covers part of the same ground. (See the notes to that section, *post*, p. 261.) Under the latter section, the buyer must be the "lawful transferee" of the document of title (which phrase means, it is submitted, that the transferor should have a good title to the goods represented thereby) (*n*), and the second transferee must take the document "in good faith and for valuable consideration." The present sub-section, therefore, contains a proviso as to notice which is not contained in s. 47. Now notice that the goods have not been paid for is not inconsistent with good faith (*o*), and such notice would not prejudice the rights of the second transferee under s. 47, whereas under the present sub-section it would be fatal.

Again, under s. 47, the transfer of a document of title by way of pledge will defeat the seller's rights there mentioned only to the extent of the pledge; those rights being exercisable subject to the rights of the transferee. Under the present sub-section the transfer is to have the same effect as if the person making the transfer were a mercantile agent in possession with the consent of the owner, *i.e.* (under s. 2 of the Factors Act, 1889), as if he were expressly authorized to pledge. But the owner has, under s. 12 (2) of the Factors Act, a right to redeem the goods before sale, and to recover the surplus of the price after sale. If, therefore, s. 12 (2) of the Factors Act is to be deemed incorporated with this sub-section, the seller's rights under the latter would appear substantially the same as under s. 47; whereas, if there is no such incorporation, the seller's rights under this sub-section will apparently be totally defeated in the case of a pledge, and under s. 47 only defeated *pro tanto*.

The question is full of difficulty, and requires judicial decision.

With the seller's consent.

With the consent of the seller.—As to the seller's consent, we have seen from *Hugill v. Masker*, *supra*, p. 167, that consent under a *de facto* contract is sufficient, though the contract is, between the immediate parties, unenforceable by action. But it would seem doubtful whether the sub-section could be construed to apply to a case where, as in *Cundy v. Lindsay* (*p*), the possession of the goods has been obtained under a trick; when, in fact, the buyer has not a voidable title, under s. 23, but no title at all (*q*). The

(*n*) See per Lord Campbell in 506.

Gurney v. Behrend (1854), 3 E. & B. at p. 634.

(*p*) (1878), 3 Ap. Ca. 459.

(*q*) Cf. *Reg. v. Buckmaster* (1887),

(*o*) *Cuming v. Brown* (1808), 9 East,

20 Q. B. D. 182.

ratio decidendi of such cases is that there is *no real consent* to the contract at all, and accordingly there would be no consent to the buyer's possession of the documents or goods. Lord Esher says (r) (with reference to the words "sold or contracted to be sold" in s. 4 of the Factors Act of 1877, which contained no provision as to consent): "I think these words mean only that there must have been a contract of sale in fact, and a vendee in fact, to whom, under the contract, the property passes, or to whom it is intended that the property in the goods shall eventually pass." So, in similar circumstances, under the earlier Factors Acts, "it has repeatedly been held that where either the goods or the documents of title are obtained from the owner . . . by some trick, a purchaser or pledgee acquires no title, for the trickster is not an 'agent entrusted' with the possession" (s).

S. 25 (2).

Delivery or transfer.—The *second* condition is here, as also under sub-s. 1, that the transaction should be an executed one. This requirement differentiates both these sub-sections from ss. 3 and 4 of the Factors Act, 1877, as was pointed out on p. 163, *supra*.

(ii) Transaction must be executed.

In good faith and without notice.—*Thirdly*, there must be good faith and absence of notice. See, as to the former, s. 62 (2); and as to the latter, *supra*, p. 165.

(iii) Good faith and absence of notice to second buyer, etc.

Of any lien or other right.—The "other right" of the seller may be, *e.g.*, a right of property, or a right to resume possession (t). It would seem that it should also include a right to avoid the contract under s. 23 on the ground of fraud (u). See notes to that section, *ante*, p. 155.

Shall have the same effect as if.—*Lastly*, with regard to the effect of the sale, pledge, or other disposition. This is to be the same as if the person making the delivery or transfer were a mercantile agent in possession with the consent of the owner, under s. 2 of the Factors Act, 1889, *i.e.*, is to be as good as if it were "expressly authorized" by the owner. The effect of cases under this sub-section is therefore the same as that under sub-s. 1, *ante*, p. 166.

(2) Effect of the sale or pledge, &c.

When the delivery or transfer is made by the buyer's mercantile agent, we have seen, under sub-s. 1, that a question may arise whether the "goods" delivered should or should not be such as he is accustomed in the way of his trade to deal with, whereas, when the delivery or transfer is made by the buyer

(r) *Hugill v. Masker* (1889), 22 Q. B. D. at p. 370.

(t) *Lee v. Butler*, [1893] 2 Q. B. 318; *Helby v. Matthews*, [1894] 2 Q. B. 262.

(s) *Cole v. N. W. Bank* (1875), L. R. 10 C. P. at p. 373.

(u) See per Smith, L.J., in *Helby v. Matthews*, *supra*, at p. 269.

- S. 25 (2). himself, it has been expressly decided that the goods need not be merchandise(v). Furthermore, it may be a question whether ss. 4 and 5 of the Factors Act, 1889, apply to deliveries, &c. by mercantile agents under this sub-section. See on this the notes to sub-s. 1, *ante*, p. 164.

ILLUSTRATIONS.

1. A. agrees to let to B. certain furniture on hire at a certain rent, B. to become owner of the furniture on paying the rent in full, and performing all the stipulations of the contract, one of them being that the furniture shall not, without A.'s consent in writing, be removed from B.'s premises. B., before all the rent is paid, sells the furniture to C., who buys in good faith and without notice of A.'s rights. The property in the furniture is in C. *Lee v. Butler*, [1893] 2 Q. B. 318.

2. A. agrees to sell to B. for 82*l.* certain machines then in the possession of C., and gives B. a delivery order on C. B. then by word of mouth sells the machines for 50*l.* to D., who acts in good faith, &c., and gives him the delivery order. D. has a good title against A., though his contract was verbal, and though D. has not fully paid B. for the goods, and A. cannot retain them against D. until he pays the remaining 25*l.* *Hugill v. Masker* (1889), 22 Q. B. D. 364.

3. A. agrees to let to B. on hire a piano, to be paid for by instalments, when the piano is to become B.'s property. A. has a right to repudiate the contract if B. does not perform all the agreement, and B. has a right to return the piano if he pleases. B. resells (not having paid all the instalments) to C., who acts without notice and in good faith. A. cannot recover the piano from C. *Helby v. Matthews*, [1894] 2 Q. B. 262.

S. 25 (3).
Meaning of
the term
"mercantile
agent."

The term "mercantile agent."—A mercantile agent is defined in s. 1 (1) of the Factors Act, 1889 (Appendix of Statutes, *post*, p. 325). The following kinds of agents were, owing to the effect of judicial decisions, excluded from the operation of the Factors Acts previous to that of 1889, and under the statutory definition contained in that Act will now be also excluded from the latter, viz. :—

- (1.) Agents having the control or management of goods only, as, *e. g.*, clerks or servants, cashiers, caretakers, and the like (*x*):
- (2.) Agents for safe custody, as, *e. g.*, bailees, wharfingers, and warehousemen (*y*):
- (3.) (Probably) Agents employed in the carriage of goods, as, *e. g.*, carriers or forwarding agents (*z*):

(v) *Lee v. Butler*, [1893] 2 Q. B. 318.

(x) *Lamb v. Attenborough* (1862), 1 B. & S. 831.

(y) *Monk v. Whittenbury* (1831), 2 B. & Ad. 484.

(z) *Hellings v. Russell* (1875), 33 L.

T. N. S. 380; and see *City Bank v. Barrow* (1880), 5 Ap. Ca. 664, 674. The definition in s. 1 (1) includes a mercantile agent having authority "to consign goods for the purpose of sale." Qy., are these decisions thereby affected?

And, under the Factors Act of 1889, an agent to sell goods retail at private houses is not a mercantile agent (*a*). S. 25 (3).

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same. Effect of writs of execution.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term “sheriff” includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

The rule at common law was that the goods of the execution debtor were bound from the *teste* of the writ, and that even a *bond fide* sale to a third person did not defeat it. And such would appear to be still the law in favour of the Crown, which was not bound by the 29 Car. 2, c. 3 (δ). To amend this state of the law the Act, 29 Car. 2, c. 3 (Statute of Frauds), was passed, which enacted, in s. 15 (commonly cited as s. 16), that the goods should be bound from the date of the delivery of the writ to the sheriff. The “binding” of the goods meant that, though the property in the goods remained still in the debtor, and could be dealt with, he could only sell subject to the rights S. 26 (1).

(*a*) *Hastings v. Pearson*, [1893] 1 Q. B. 62. (*δ*) *Maxw. on St.* (1st ed.), p. 115.

S. 26 (1). of the execution creditor, unless he sold in market overt, in which case the rights of the sheriff were gone altogether (c).

To further protect *bond fide* buyers, s. 1 of the 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), provided that *bond fide* titles acquired *before actual seizure* by a person, not having at the time notice of any writ remaining unexecuted in the hands of the sheriff, &c., should be good.

The present section reproduces the provisions of these two Acts (which are both included in the schedule of repealed enactments, *post*), with these modifications, viz., that in sub-s. 1 the word "hour" is added before "day of the month and year" in the Act of Chas. II.; and in sub-s. 2 the words "no such writ" (*i.e.*, "writ of *fi. fa.* or other writ of execution," in sub-s. 1) are substituted for "no writ of *fi. fa.*, or other writ of execution, and no writ of attachment" in the Act of Victoria; and the words in the latter Act, "before the actual seizure or attachment thereof," in connection with the "title acquired," are omitted. The addition of the word "hour" is a real addition to the previous law; the other alterations create no substantial change, the omission of the words "before the actual seizure" being immaterial, as the "notice" which the buyer is to have to invalidate his title is notice of a writ "remaining unexecuted," *i.e.*, notice before seizure.

In good faith.—This is defined in s. 62 (2) as "honestly, whether . . . negligently or not."

Notice.—On the analogy of the Bankruptcy Act, s. 49, "notice" here would mean "knowledge," not "means of knowledge" (d).

Or any other writ.—The third party, in fact, must not have notice of the general position of the debtor, nor necessarily of his position with regard to any particular writ.

Had been delivered.—Notice that it was *probable* that the writ *would be* delivered is, it would seem, insufficient. "A notice of something certain and inevitable—as of the rising of the tide—though given beforehand, might perhaps, after the event, be treated as notice of the fact; but this cannot be said with respect to what is merely probable" (e).

And remained unexecuted.—These words practically lay down the requirement that the third person's title should be acquired

(c) *Samuel v. Duke* (1838), 3 M. & W. 622; *Woodland v. Fuller* (1840), 11 A. & E. 859.

(d) See *Bird v. Bass* (1843), 6 M. & G. 143. See the principle ex-

plained by Parke, B., in *Hope v. Meek* (1855), 10 Ex. 829.

(e) Per Bramwell, B., in *Gladstone v. Padwick* (1871), L. R. 6 Ex. at p. 211.

before seizure, as under s. 1 of the 19 & 20 Vict. c. 97. See S. 26 (2).
remarks above.

Sheriff.—Defined in sub-s. 2, and will include an under-sheriff, bailiff, or sheriff's officer. Such an officer would be, for example, a high bailiff under the County Courts Act of 1888, s. 146.

Under s. 29 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), a sheriff who wrongfully neglects (*inter alia*) to give a receipt for a writ of execution, stating the day of its delivery (s. 10 (1)), is punishable as therein mentioned. *Quare*, whether this remedy is affected by the provisions of s. 57 of this Act, which declares that "any right, duty or liability" under the Act may "be enforced by action."

Sheriff's
liability for
breach of
duty.

See for the Scotch law, Bell's Prin., Bk. 5, ch. 2.

S. 26 (3).
Law of
Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. Duties of
seller and
buyer.

Delivery, acceptance, and payment must be (1) of the goods; (2) in accordance with the contract of sale. S. 27.

"After the contract of sale has been completed, the chief and immediate duty of the seller, in the absence of any contrary stipulations, is to deliver the goods to the buyer, as soon as the latter has complied with the conditions precedent, if any, incumbent on him" (*f*).

"The seller having done or tendered all that the contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he *accepts* and *pays* the price" (*g*). "The buyer's obligation to accept depends on the compliance by the seller with his obligation to deliver" (*h*).

The parties may, under s. 57, make what bargain they please. Accordingly they may agree that delivery may be made to a carrier, as under s. 32; or at the destination of the goods only,

(*f*) Benj. pp. 676, 677.

(*h*) *Ibid.* p. 940.

(*g*) *Ibid.* p. 708.

S. 27. as (by implication) under s. 33; or they may agree that delivery to a carrier may be good, and yet that the price should not be payable unless the goods arrive (i).

Delivery. To deliver the goods.—“Delivery” is defined in s. 62 (1), and the general rules with respect thereto are stated in s. 29. It is a reciprocally concurrent condition with payment (s. 28); and is also, as above stated, conditional on the buyer’s performance of any other condition precedent, as, *e. g.*, notice (where essential) of the place of acceptance (k). “There may be a symbolical delivery of goods, divesting the seller’s possession and lien.” Lord Kenyon, C. J., said, in *Chaplin v. Rogers* (l), that “where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of the warehouse in which the goods are lodged, or by the delivery of other *indicia* of property.” And there was another dictum of Lord Kenyon in *Ellis v. Hunt* (m). On this principle, the delivery of the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel” (n).

Delivery of a key. The delivery of a key is not, however, really *symbolical*, but an actual transfer of the means of control (o). In *Wilton v. Tucker* (p), Kekewich, J., says:—“The delivering of the key giving exclusive control is regarded as delivery of possession itself.”

Delivery by bill of lading. When the goods are deliverable by a bill of lading, the seller makes a good delivery if he forward to the buyer, as soon as he reasonably can after the shipment, a bill of lading duly indorsed and effectual to pass the ownership of the goods (q), and purporting to represent goods in accordance with the contract, and which are in fact in accordance therewith (r).

Furthermore, the delivery must be “of the goods,” *i. e.*, of the goods contracted for. Thus, the goods must answer their description under s. 13; must be of proper quality and fitness, &c., under ss. 12—15; must be in a deliverable state, under s. 62 (4),

(i) See per Cur. in *Calcutta S. N. Co. v. De Mattos* (1863), 32 L. J. Q. B. 322.

(k) *Armitage v. Insole* (1850), 14 Q. B. 728; *Sutherland v. Allhusen* (1866), 14 L. T. N. S. 666.

(l) (1800), 1 East, 192.

(m) (1789), 3 T. R. 464, 468.

(n) *Atkinson v. Maling* (1788), 2 T. R. 462; Benj. p. 704.

(o) See Pollock & Wright on Poss. pp. 60 *et seq.*

(p) (1888), 39 Ch. D. at p. 676. *Secus*, if the control is not exclusive: *Milgate v. Kebble* (1841), 3 M. & G. 100.

(q) *Sanders v. McLean* (1883), 11 Q. B. D. 327.

(r) *Tamvaco v. Lucas* (1859), 1 E. & E. 581, 592.

and s. 30 (3); and of the right quantity, under ss. 30, 31; and the seller must be the owner, or entitled to deal with them, under s. 12 (1). If the tender be irregular, it may be, within the time limited for delivery, withdrawn, and a good tender substituted (s).

S. 27.

To accept and pay.—"Acceptance" is defined in ss. 34 to 36, and depends, as above stated, upon the regularity of the seller's delivery; and upon the seller's performance of any condition precedent to delivery, as, *e.g.*, notice (where essential) of the place of delivery (t). The buyer may, however, be bound to accept goods at a place other than that fixed if the latter were fixed only in the interest of the seller (u). Acceptance.

As to the ascertainment of the price, see ss. 8, 9, *ante*, pp. 61 Payment.

—64. The liability for the price *prima facie* arises only when the property has passed (see ss. 1 and 49)(v); or when the buyer took the risk under ss. 20 and 33; or (even though the property has not passed or the goods been delivered) if the buyer agreed (x) (under s. 49 (2)), or is bound (under s. 20) to pay, irrespective of these facts. The buyer's liability to pay may sometimes be dependent upon notice by the seller of the amount, as where the ascertainment of the price is in the option of the seller (y). And when the time of payment is fixed with reference to the arrival of the goods, and the goods perish, the buyer (if liable) must pay "within a reasonable time after the arrival becomes impossible" (z).

Payment to the true owner is a good payment as against a seller without title under s. 21 (a).

Where the goods are to be paid for by a bill or note, which is not in fact given, the buyer is entitled to credit till the time when the bill, &c., would have matured (b), unless credit was made conditional on such bill being given (c). As to the dis-

(s) *Borrowman v. Free* (1878), 4 Q. B. D. 500.

(t) *Davies v. MacLean* (1873), 21 W. R. 264.

(u) *Neill v. Whitworth* (1865), L. R. 1 C. P. 684.

(v) *And per Parke, B., in Laird v. Pim* (1841), 7 M. & W. 478.

(x) *Dunlop v. Grote* (1845), 2 C. & K. 153.

(y) *Hauls v. Hemyng* (1617), Cro. Jac. 432 (cited by Parke, B., in *Vyse v. Wakefield* (1840), 6 M. & W. 442, 454); *Holmes v. Twist* (1614), Hob. 51, cited by Bramwell, B., in *Makin v.*

Watkinson (1870), L. R. 6 Ex. 25, 29.

(z) *Per Bayley, J., in Fragano v. Long* (1825), 4 B. & C. at p. 222. See also *Alexander v. Gardner* (1835), 1 B. N. C. 671.

(a) *Dickenson v. Naul* (1833), 4 B. & Ad. 638; *Allen v. Hopkins* (1844), 13 M. & W. 94.

(b) *Mussen v. Price* (1803), 4 East, 147; *Day v. Picton* (1829), 10 B. & C. 120.

(c) *Nickson v. Jepson* (1817), 2 Stark. 227; *Rugg v. Weir* (1864), 16 C. B. N. S. 471.

S. 27.

tion in this connection between "bill with option of cash" and "cash with option of bill," see per Cockburn, C.J., in *Anderson v. Carlisle Horse Clothing Co.* (d).

Mr. Benjamin thus states the law generally with regard to payment (e):—

"The chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on. The terms of the sale may require—first, an *absolute* payment in cash, and this is always implied when nothing is said; or, secondly, a *conditional* payment in promissory notes or acceptances; or, thirdly, it may be agreed that credit is given for a stipulated time, without payment either absolute or conditional. In the first two cases the buyer is bound to pay, if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last case he has a right to demand possession of the goods without payment. . . . In cases where the property has passed, the buyer must pay the price according to the terms agreed on, even if the goods are destroyed in the vendor's possession (see s. 20). . . . The goods are at the buyer's risk; they are *his* goods from the moment that the property passes, and the price is due to the vendor, who simply holds the goods as bailee for the buyer in such a case (f). And even where the property has not passed, and the price is to be payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery" (g). (See s. 20).

Payment in a negotiable security.

"The payment for goods may, by the contract, be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the vendor's right to the price reviving on non-payment of the security. But if a dispute arise as to the intention of the parties, the question is one of fact for the jury (h). The intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken 'in payment' for the goods (i), or 'in discharge' of the price (k). . . .

(d) (1870), 21 L. T. N. S. 760. See also *Schneider v. Foster* (1857), 2 H. & N. 4.

(e) pp. 715–717, 732.

(f) *Rugg v. Minett* (1809), 11 East, 210.

(g) *Castle v. Playford* (1872), L. R. 7 Ex. 98.

(h) *Goldshede v. Cottrell* (1836), 2 M. & W. 20.

(i) *Stedman v. Gooch* (1793), 1 Esp. 4; *Maillard v. Duke of Argyle* (1843), 6 M. & G. 40.

(k) *Kemp v. Watt* (1846), 15 M. & W. 672.

The payment is absolute on delivery of the bill, and takes effect from that date, but is defeated on the happening of the condition, i.e., non-payment at maturity (*l*). Whenever it can be shown to be the intention of the parties that a bill or note should operate as immediate payment, then the buyer will no longer be indebted for the *price of the goods*, although he may be responsible on the security; and the bill or note given in such case may be that of the buyer himself (*m*), or that of a third person (*n*), on which the buyer has indorsed his name. And if the buyer offer to pay in cash, and the seller takes a negotiable security in preference, the security is deemed to be taken as an absolute, not a conditional, payment" (*o*).

As to the *modes* of payment or tender, see Benj. pp. 718—732; the duty of the seller with regard to the security, pp. 734—739; the character of the security, pp. 739, 740; payment to agents, pp. 740—746; appropriation of payments, pp. 746—750.

ILLUSTRATIONS.

1. A. agrees to sell and ship to B. 2,000 tons of rails, payment to be made in exchange for the bill of lading. A. tenders to B. a bill of lading (which had been drawn in three parts) duly indorsed, and effectual to pass the property, but does not tender the other two. B. is bound to accept and pay for the goods, as A. has performed his contract. *Sanders v. Maclean* (1883), 11 Q. B. D. 327.

2. A. agrees to sell to B. 1,000 tons of coal deliverable at R., payment to be made half in cash on handing over the bill of lading, and policy of insurance, and half on delivery at R. A. ships the coal, and transfers the bill of lading and policy to B. B. then pays the half price. The coal never arrives. A. cannot recover the balance of the price, as he never delivered the coal at R., nor can B. recover the other half paid, as with respect to so much of the price A. had performed his contract by delivery to the carrier. *Calcutta Steam Navigation Co. v. De Mattos* (1863), 32 L. J. Q. B. 322.

3. A. agrees to sell B. 1,000 tons of iron, deliverable by a certain date, but if B. does not then require delivery, B. to pay for the iron at that date. B. must pay on that date, although the property has not passed, and there has been no delivery, as he expressly contracted to do so. *Dunlop v. Grote* (1845), 2 C. & K. 153 (*p*).

4. A. agrees to sell goods to B. as required by B. A.'s liability is to deliver when thereto required by B. If B. makes unreasonable delay, A. must offer delivery, or inquire of B. when he would take delivery of the goods. *Jones v. Gibbons* (1853), 8 Ex. 920.

5. A. agrees to sell to B. during the space of three years twenty tons of coal yearly, to be put on board ship at C. A.'s liability is to deliver

(*l*) *Belshaw v. Bush* (1851), 11 C. B. 191; *Turney v. Dodwell* (1854), 3 E. & B. 136; Benj. pp. 732—734.

(*m*) *Sibree v. Tripp* (1846), 15 M. & W. 23.

(*n*) *Sarl v. Rhodes* (1836), 1 M. & W. 153.

(*o*) Benj. p. 734, quoting *Cowanjee v. Thompson* (1845), 5 Moo. P. C. 165.

(*p*) See s. 49 (2), *post*, p. 272.

S. 27.

the coal when B. names a ship, and states the port of discharge. *Armitage v. Insole* (1850), 14 Q. B. 728 (q).

6. A. agrees to sell B. goods "ex quay or warehouse." B.'s liability is to accept when A. gives notice of the place of storage. *Davies v. McLean* (1873), 21 W. R. 264.

7. A. sells goods to B. on three months' credit, and also on the terms that if B. wants further credit he must then give a bill at two months. B. does not give the bill. B.'s liability, under these circumstances, is to pay for the goods at the end of three months, as further credit was made conditional on the giving of a bill. *Nickson v. Jepson* (1817), 2 Stark. 227.

8. A. agrees to sell to B., on the arrival of the ship C., fifty cases of tallow. A.'s liability is to deliver the tallow if and when the ship arrives, whether or not she arrives with tallow on board, as he so expressly contracted. *Hale v. Rawson* (1858), 4 C. B. N. S. 85.

9. A. sells to B. the cargo of the P. "as it stands" at 30s. a quarter, the quantity to be taken from the bill of lading. B. pays according to the quantity so stated. The actual quantity proves less. A. is not bound to refund the excess price, as the parties agreed that the quantity should be considered so much, and the price paid accordingly. *Covas v. Bingham* (1853), 2 E. & B. 836.

10. A. agrees to sell B. 500 bales of cotton, to arrive by ship, and to be taken from the quay. By a delivery from the quay A. would be saved expense. A. offers to deliver the cotton after landing either from the warehouse at quay weights, and free of warehouse charges, or to take it back to the quay and there deliver. B. is bound to accept, as the place of delivery originally fixed was so fixed in the interests of A. only, and there was no condition of delivery immediately on arrival from the quay. *Neill v. Whitworth* (1865), 18 C. B. N. S. 435.

Payment and
delivery are
concurrent
conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

S. 28.

"Generally the buyer, in a bargain and sale of goods, where the property has passed, is entitled to take possession of them, and it is the seller's duty to deliver this possession. But this right is only *prima facie*, and it may well be bargained that the possession shall remain with the seller until the fulfilment of certain conditions precedent by the buyer. When nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions, as is explained in Book IV., Part. I. on 'Conditions.' The seller cannot insist on pay-

(q) Cf. *Wackerbarth v. Masson* (1812), 3 Camp. 270.

ment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price. But it constantly happens that there is a stipulation to the contrary of this, and that the parties agree that the buyer is to take possession of the goods before paying for them, or in the usual phrase, that the goods are sold on credit. The legal effect, then, is that there has been an actual transfer of *title*, and an actual transfer of the *right of possession* by the bargain, so that in pleading, and for all purposes, save that for the seller's lien for the price (*r*), the buyer is considered as being in possession, by virtue of the general rule of law that the "property of personal chattels draws to it the possession" (*s*).

S. 28.

"Where goods are sold, and *nothing is said as to the time of the delivery, or the time of payment*, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded *upon payment of the price*. But the buyer has no right to have possession of the goods till he pays the price. . . . If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession" (*t*).

The rule stated in this section as applicable to a contract of sale is only a special instance of the general rule that, when two parties bind themselves to do acts *at the same time*, neither is bound to do his own part before the other does his;—all that is necessary is that he should *be ready and willing* to do it, and he need not prove performance, or what is tantamount thereto, *i. e.*, tender (*u*). On this point Parke, B., makes the following pertinent remarks in *Pickford v. Grand Junction Ry. Co.* (*x*):—"A strictly legal tender . . . is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it, in which case the tender stands in the place of payment, and is, in fact, a payment, so far as it is in the power of the party tendering to make it one, but which remains incomplete only because the party to whom the money is offered refuses to accept it. . . . Here the acts to be done by the plain-

(*r*) As to this, see ss. 41—43.

(*s*) Benj. pp. 678, 679.

(*t*) Per Cur. in *Bloxam v. Sanders* (1825), 4 B. & C. at p. 948.

(*u*) See per Le Blanc, J., in *Rawson v. Johnson* (1801), 1 East, 203, and notes to *Cutter v. Powell* (1793), 2 Sm. L. C. (9th ed.), 1.

(*x*) (1841), 8 M. & W. 372, 377.

S. 28. tiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs until [the defendants perform their part].”

An averment that the plaintiff was “ready and willing” means “that the non-completion of the contract was not the fault of the plaintiff, and that [he] was disposed and able to complete it” (y). Thus, a demand to the other party to perform his part is evidence of readiness and willingness in the plaintiff (z); and the insolvency of the buyer is also evidence that he is not “ready and willing” to pay (a).

Unless otherwise agreed.—Such being the general rule applicable, “where nothing is said as to the time of the delivery or the time of payment” (b), the parties may modify it by agreement, under s. 55; as when the dates of the respective performances are fixed by the contract, according to the principles laid down in *Pordage v. Cole* (c). Thus the buyer may agree to pay on a fixed date, irrespective of delivery (d); or the seller may agree to deliver irrespective of payment, as in the ordinary case of a sale on credit (e).

ILLUSTRATIONS.

1. A. agrees to sell to B. 100 quarters of malt, and to deliver on request. B. requests A. to deliver the malt at a particular place, and is then ready to accept and pay for it. B. may recover against A. for non-delivery of the malt, and need not prove a tender. *Rawson v. Johnson* (1801), 1 East, 203.

2. A. agrees to sell goods to B. for 660*l.*, no time being fixed for delivery or payment. A. afterwards requests B. to accept and pay for them, which B. refuses. A. cannot recover against B. for non-acceptance, unless he can also prove that he was ready and willing to deliver the goods. *Hannuic v. Goldner* (1843), 11 M. & W. 849.

3. A. agrees to sell to B. fifty tons of bars at 9*l.* a ton, deliverable by A. within fourteen days, and to be paid for by B. in cash at the end of that time. A. must prove an actual delivery within fourteen days before he can recover the price, and B. need not then pay till the expiration of that time, as delivery and payment are not made concurrent conditions. *Staunton v. Wood* (1851), 16 Q. B. 638.

4. A. agrees to sell to B. 1,000 tons of iron to be delivered before the end of April, if required by B., but if not so required to be paid for then. A. may recover the price of the goods, although he has not tendered them, it being so agreed. *Dunlop v. Grote* (1845), 2 C. & K. 153.

(y) Per Cur. in *Cort v. Ambergate Ry. Co.* (1851), 17 Q. B. 127.

(z) *Wilks v. Atkinson* (1815), 1 Marsh. 412.

(a) *Laurence v. Knowles* (1839), 5 B. N. C. 399.

(b) Per Cur. in *Bloxam v. Sanders* (1825), 4 B. & C. 941.

(c) 1 Wm. Saund. 548, see notes to *Cutter v. Powell* (1793), 2 Sm. L. C. (9th ed.) 1.

(d) *Dunlop v. Grote* (1845), 2 C. & K. 153; s. 49 (2), *post*, p. 272.

(e) *Staunton v. Wood* (1851), 16 Q. B. 638.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

S. 29.
Rules as to
delivery.

The general rule previous to the Act was that, "in the absence of a contrary agreement, the seller is not bound to send or convey the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction" (*f*).

S. 29 (1).

The effect of this sub-section is that, when the seller is not to send the goods, the buyer must take delivery at the seller's place of business or residence, unless the goods are specific and known to be elsewhere.

There is no provision as to the place of delivery when the seller is to send "to the buyer"; but as, according to s. 27, delivery must be made "in accordance with the contract," the contract would itself, expressly or impliedly, show this.

With regard to the place of delivery, concerning which there was no authority, Mr. Benjamin says (*g*): "When nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal at the place where they are when sold." To the same effect is the French Civil Code, s. 1609, and the Indian Contract Act, s. 94. See also, in America, *Hatch v. Oil Co.* (*h*). This sub-section substantially reproduces the previous assumed rule, with the addition thereto in the proviso of the necessity of *knowledge* of the locality of specific goods.

The place of
delivery.

When the place of delivery is uncertain, and within the option of the seller, he must give notice of the place. This is a condition (*i*).

(*f*) Benj. p. 682.

(*g*) p. 684.

(*h*) 10 Otto, 134.

(*i*) *Davies v. MacLean* (1873), 21 W. R. 264.

S. 29 (2).

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Within a reasonable time.—"Reasonable time" is, under s. 56, a question of fact. For "reasonable hour," see sub-s. 4, *post*, p. 186.

"When the contract imposes on the seller the obligation of sending the goods . . . if nothing is said as to time, he must send within a reasonable time; and when the sale is in writing, if nothing is said as to time, parol evidence is admissible of the facts and circumstances attending the sale, in order to determine what is a reasonable time. . . . But when the contract expresses the time, the question is one of construction, and therefore one of law for the Court, not of fact for the jury" (l).

"The correct mode of ascertaining what reasonable time is in such a case as this, is by placing the Court and jury in the same situation as the contracting parties themselves were in at the time they made the contract—that is to say, by placing before the jury all those circumstances which were known to the parties at the time the contract was made, and under which the contract itself took place" (m).

And subsequent events will also be taken into consideration, as appears from the following judgments:—

"When the language of a contract does not, expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application. . . . Reasonable time . . . has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably" (n). "Reasonable time should be ascertained by a consideration of all circumstances which eventually happen, and which are outside the control of [the party]" (o).

No time for sending them is fixed.—The parties may, however, in the contract specify the time of delivery. In this con-

(l) Benj. p. 686.

Raymond, [1893] A. C. 22 at pp. 32,

(m) Per Alderson, B., in *Ellis v.*

33.

Thompson (1838), 3 M. & W. 445, 457.(o) Per Lord Ashbourne, *ibid.* at(n) Per Lord Watson in *Hick v.*

p. 34.

nection (the question being one of construction, as above stated) various rules have been laid down in the cases. Thus, when delivery is to take place "within" a certain time, the date of the contract is excluded (*p*). And, in the computation of the time, "days" and "running" days mean, in the absence of a contrary agreement, or trade custom (*q*), "consecutive" days, including Sundays (*r*). Thus, "a promise to deliver goods in two months from the 5th of October is fulfilled by delivery at any time on the whole day of the 5th of December, so that an action against the seller would be premature, if brought before the 6th" (*s*).

Stipulations as to time are, or are not, of the essence of the contract according to the intention (*t*).

"Month": See s. 10 (2), *ante*, p. 67. The 29th of February must be counted as a separate day (*u*).

The following meanings have been respectively attributed to the various terms hereinafter mentioned, that is to say:—
 "directly" has been interpreted to mean a shorter time than a reasonable time (*v*); "forthwith," when employed in connection with a *fixed* time for payment, as meaning some time within the time fixed for payment (*x*); and "as soon as possible" in a manufacturer's contract, as meaning "within a reasonable time, with an undertaking to do it in the shortest practicable time," or "as quickly as it could be made in the largest establishment with the best appliances" (and not "as soon as possible for the seller") (*y*), subject, however, to delay caused by any event which the parties might reasonably be held to have contemplated, as, *e.g.*, other orders on hand at the time (*z*).

When the time fixed for delivery has been *postponed* at the request of the other party, the postponement, unless amounting to a contract (subject in that case to the provisions of s. 4, *q. v.*), is a mere voluntary forbearance, not binding on the other party (*a*).

(*p*) *Webb v. Fairmaner* (1838), 3 M. & W. 473.

(*q*) *Cochran v. Retberg* (1800), 3 Esp. 121.

(*r*) *Brown v. Johnson* (1842), 10 M. & W. 331.

(*s*) *Benj. p. 687*. See also *S. Staff. Tramways v. Sickness, &c. Ass. Co.* (1890), 60 L. J. Q. B. 47.

(*t*) See s. 10 (1), *ante*, p. 64.

(*u*) 42 & 43 Vict. c. 59, repealing 40 Hen. 3.

(*v*) *Duncan v. Topham* (1849), 8 C. B. 225.

(*x*) *Staunton v. Wood* (1851), 16 Q. B. 638. See also *Roberts v. Brett* (1865), 11 H. L. 337.

(*y*) *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670.

(*z*) *Attwood v. Emery* (1856), 1 C. B. N. S. 110.

(*a*) The cases are collected in *Benj. pp. 692—696*; and see p. 47, *ante*.

S. 29 (2).

Delivery
"within" a
certain time

(1) "Directly."

(2) "Forthwith."

(3) "As soon as possible."

S. 29 (2).

ILLUSTRATIONS.

1. A. agrees to sell B. 200 tons of lead of a particular mine, deliverable in the Thames. B., at the time of the contract, is told by the broker that the lead is ready for shipment. The usual ports of shipment are G. or L., but to get to G. the lead has to be brought by barges down a river. During this part of the transit the lead is delayed by the lowness of the water; and is consequently delayed in arriving in the Thames. B. is not bound to accept the lead, as a reasonable time in this contract meant such a time as would be required for transit to the Thames from the more distant of either G. or L., had the goods at the time of the contract been ready for shipment at those places. *Ellis v. Thompson* (1838), 3 M. & W. 445.

2. A. agrees to sell to B. 2,000 tons of rails, to be shipped to P., and payment to be made in exchange for the bill of lading. A. must use every reasonable exertion, under the circumstances of the case, to forward the bill of lading as soon as possible after shipment, not necessarily in time to meet the arrival of the ship. Per Brett, M.R., in *Sanders v. MacLean* (1883), 11 Q. B. D. at p. 337 (b).

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

S. 29 (3)

By this sub-section the attornment of the bailee in possession of goods is necessary to complete delivery, but the operation of documents of title is left as it was before the Act. Documents of title are defined in s. 62 (1), incorporating s. 1 (4) of the Factors Act, 1889. (Appendix of Statutes, *post*, p. 325.)

With regard to the general rule, Martin, B., says, *arguendo*, in *Buddle v. Green* (c), "If one buys goods of another in possession of a third party, the vendor undertakes that they shall be delivered in a reasonable time. . . . If I buy a horse of you in another man's field, it is part of the contract that if I go for the horse I shall have it. . . . A man does not buy a law-suit."

Delivery of
(1) Bill of
lading.

With regard to bills of lading, the law is clear. "During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as [a] symbol [of the cargo], and

(b) See also *Barber v. Taylor* (1839), (c) (1857), 27 L. J. Ex. 33, 34.
5 M. & W. 527.

the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. . . . It is a key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be" (d). By the transfer, therefore, of the bill of lading, the only delivery of the goods possible, under the circumstances, has been made.

S. 29 (3).

Other documents of title stand on a different footing; and have been treated by the Courts as "mere tokens of authority to receive possession; as mere 'offers' by the warehouseman to hold the goods for an indorsee of the warrant, inchoate and incomplete, till the buyer has obtained the warehouseman's assent to attorn to him" (e). "A delivery order is not a representation, but a mere promise to deliver goods. By [its] mere delivery there is no change made in the custody of the goods" (f). This is the law with regard to actual receipt under s. 4 (g); and the divesting of the seller's lien under s. 39 (h); and also with regard to the seller's duty to deliver the goods (i). The seller is, in the last case, responsible if the bailee wrongfully refuses to attorn to the buyer; if he were not, the buyer would be buying, in the words of Martin, B., above quoted, "a law-suit." But the seller is not responsible for a refusal of the bailee by reason of the buyer's non-performance of a condition precedent to delivery, as, e.g., the handing over the warrant or order, when the goods are made thereby deliverable "on presentation" (k).

(2) Other documents of title.

On this question Mr. Benjamin makes the following remarks (l):—"The indorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are known as representing the goods, would form a good delivery in performance of the contract, so as to defeat any action by the buyer against the seller for non-delivery of the goods, according to the principles of *Salter v. Woollams* and *Wood v. Manley* (m). The transfer of such documents would, of course, not be a sufficient

(d) Per Bowen, L.J., in *Sanders v. MacLean* (1883), 11 Q. B. D. at p. 341.

(e) Benj. p. 829.

(f) Per Lord Esher, M.R., in *Gillman v. Carbutt* (1889), 37 W. R. 437 at p. 439.

(g) *Farina v. Home* (1846), 16 M. & W. 119.

(h) *McEwan v. Smith* (1849), 2 H. L. C. 309.

(i) *Buddle v. Green* (1857), 27 L. J. Ex. 33. See also per Cur. in *Wood v. Baxter* (1883), 49 L. T. N. S. 45.

(k) *Bartlett v. Holmes* (1853), 22 L. J. C. P. 182.

(l) pp. 704, 705.

(m) See next page.

S. 29 (3). delivery by the seller, if the goods represented by the documents were subject to liens or charges in favour of the bailees" (i).

The effect of the transfer of documents of title on the title to the goods, when the seller is in possession, is discussed in the notes to s. 25 (1), *ante*, p. 160; and on the seller's lien and right of stoppage in those to ss. 25 (2), *ante*, p. 166, and to 47, *post*, p. 257.

ILLUSTRATIONS.

1. A. sells to B. by auction a rick of hay then standing on C.'s land, who had given a licence for its removal, which licence is read at the auction. A. gives B. a letter to C. requesting him to allow removal by B. C. refuses. A. is not liable to B. for non-delivery, as he has delivered, C. having agreed to become bailee to the buyer, and his previous licence being after the sale irrevocable. *Salter v. Woollams* (1841), 2 M. & G. 650 (m).

2. A., the outgoing tenant of a farm, who is bound, for every load of hay he removes, to bring on the farm two loads of manure, sells a rick of hay to B. C., the incoming tenant, consents to the removal of the hay if A. brings the manure, which A. does not do, and C. prevents B. removing the hay. A month elapses, and C. afterwards agrees to the removal; but the hay having been damaged, B. refuses it. A. cannot recover the price of the hay, as he has never delivered, C.'s acknowledgment being only conditional. *Smith v. Chance* (1819), 2 B. & A. 753 (n).

3. A. sells to B. a quantity of hops then stored with C., and B., with A. and C.'s consent, takes away part, but before B. can remove the residue they are seized by a creditor of D., from whom A. bought. A. is not liable to B. for non-delivery, as he put the hops at B.'s disposal, and C. had acknowledged B.'s right thereto. *Wood v. Tassell* (1844), 6 Q. B. 234.

4. A. sells to B., subject to C.'s charges, a number of slates stated to be lying at C.'s wharf, and gives B. a delivery order on C. B. presents the order and is ready to pay the charges, but C. refuses to deliver, as D. (from whom A. bought) had (but unjustifiably) stopped the slates in transit. A. is liable to B. for non-delivery, C. having refused to attorn to B. *Buddle v. Green* (1857), 27 L. J. Ex. 33.

5. A. agrees to sell B. a quantity of iron, then lying at C.'s wharf. A. indorses to B. C.'s warrant, whereby C. engaged to deliver to A.'s order, the warrant being duly indorsed, and handed over. B. makes default in handing over the warrant, and C. refuses to deliver. A. has made a good delivery, as C.'s refusal was B.'s fault, and B. is liable for the price. *Bartlett v. Holmes* (1853), 13 C. B. 630; 22 L. J. C. P. 182.

S. 29 (4). (4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

At a reasonable hour.—Elaborate rules as to the reasonableness of the hour of delivery were stated in *Startup v. Macdonald* (o), and distinctions were made according as the party

(i) On this latter point, see s. 12 (3), *ante*, pp. 79, 84.

(m) See also *Wood v. Manley* (1834), 11 A. & E. 34.

(n) See also *Buddle v. Green* (1857), 27 L. J. Ex. 33.

(o) (1844), 6 M. & G. 593.

bound to performance was to perform at a particular place or not; and it was said that "*it was not to be left to the jury to be determined as a question of practical convenience or reasonableness in such case, but the law appears to have fixed the rule.*" In future, the "reasonableness in each case" is a question of fact under this sub-section, and the law is thus changed; the legislature evidently intending that one uniform rule should apply, under sub-s. 2, to time, and under this sub-section to hour(*p*). In the case in question, the jury had (erroneously) found *as a fact* that a tender at half-past eight on Saturday night was an unreasonable time for the tender of a quantity of oil.

S. 29 (4).

ILLUSTRATION.

A. agrees to sell to B. ten tons of linseed oil, to be delivered within the last fourteen days of March, and to be then paid for in cash. A. tenders the oil to B. at half-past eight o'clock at night on Saturday, March 31st, in time to allow B. to examine the oil before twelve o'clock. [Submitted] that A.'s tender is bad, as made at an unreasonable hour, and that B. may reject the oil. See *Startup v. Macdonald* (1844), 6 M. & G. 593.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

"Deliverable state" is defined in s. 62 (4).

S. 29 (5).

There is no authority at common law for the rule here stated. The only case found is in America(*q*). See also Story on Sale, ss. 297 (a), 394, and s. 1608 of the French Civil Code. In *Playford v. Mercer* (*r*), where the goods were to be taken by the buyer "from the deck," this phrase was held to mean that the seller would pay all that was necessary (in the case, harbour dues) to enable the buyer to remove from the deck.

When the goods are to be shipped "free on board," the expenses of shipment must be borne by the seller(*s*).

With regard to the risk in the latter case, see notes to s. 20, *ante*, p. 144.

ILLUSTRATION.

A. agrees to sell to B. a quantity of wool then lying unsacked in certain rooms, the quantity to be ascertained by weighing. A. sacks

(*p*) See also s. 56.

(*q*) *Coles v. Kerr*, 20 Verm. 21.

(*r*) (1870), 22 L. T. N. S. 41.

(*s*) Per Brett, M.R., in *Stook v. Inglis* (1884), 12 Q. B. D. at p. 573; *Cowasjee v. Thompson* (1845), 5 Moo. P. C. 165.

S. 29 (5). the wool in B.'s sacks, and then weighs it and ships it to B. The expense of sacking the wool must be borne by A. *Coles v. Kerr*, 20 Verm. 21.

Delivery of
wrong
quantity.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

S. 30. The law under this section is thus stated by Mr. Benjamin (†):—
“The seller does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the seller has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. . . . If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the buyer; and if the contract be for a specified quantity to be delivered in parcels from time to time, the buyer may return the parcels first received, if the later

deliveries be not made, for the contract is not performed by the seller's delivery of less than the whole quantity sold (*u*). But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment until the seller makes delivery of the rest."

S. 30.

S. 30, sub-ss. 1—3, must be read subject to sub-s. 4, and to ss. 27 and 31 (1). See notes to sub-s. 4, *post*, p. 192.

A quantity of goods less . . . A quantity of goods larger . . . S. 30 (1), (2).
The provisions of these two sub-sections may be considered under the following heads:—

- (1) The quantity of the goods contracted for :
- (2) The rights and liabilities of the buyer.

Firstly, the quantity of the goods contracted for will depend upon the terms of the contract. And the use of such terms as "cargo," "not less than," "more or less," "about," or "say about," makes the question sometimes difficult to determine.

With regard to the word "cargo" as used in contracts of sale, "there is not an entire concordance of the authorities as to the true construction of a contract for the sale of "a cargo" (*x*). *Kreuger v. Blanck* (*y*), and *Borrowman v. Drayton* (*z*), are authorities to the effect that the word "cargo" means the entire quantity of goods loaded on board a vessel as freight for a particular voyage, and that a buyer is not bound to accept a part only of the entire load. But the Privy Council (*a*) have declared that the phrase is susceptible of different meanings according to the context of the particular contract, and in the case in question, which dealt with a cargo of wheat, the word was interpreted as meaning "as many bags of wheat as would fill the vessel."

When words of estimate are added to "cargo," it has been held that the essential term is "cargo" (*b*). And a cargo may also be sold "as it stands," the quantity to be taken from the bill of lading. In such a case the parties mutually take the risk of the quantity being in excess or deficiency (*c*) of that stated in the bill of lading (*c*). The latter case must be distinguished from ordinary cases of sales of cargoes by bill of lading. There the

The quantity of the goods contracted for.

Meaning of "a cargo."

(*u*) Per Parke, J., in *Ozendale v. Wetherell* (1829), 9 B. & C. 386; approved in *Col. Ins. Co. of New Zealand v. Adelaide Ins. Co.* (1886), 12 Ap. Ca. 128. Other cases are quoted in Benj. p. 698, note (*n*).

(*x*) Benj. p. 571.

(*y*) (1869), L. R. 5 Ex. 179.

(*z*) (1876), 2 Ex. D. 15.

(*a*) In *Col. Ins. Co. of New Zealand v. Adelaide Mar. Ins. Co.*, *supra*.

(*b*) *Levi v. Berk & Co.* (1886), 2 Times L. R. 898.

(*c*) *Covas v. Bingham* (1853), 2 E. & B. 836. See in America, *Heller v. Allentown Manufacturing Co.*, 39 Hun, 547.

S. 30 (1), (2). rule is that the bill of lading must on its face purport to represent goods in accordance with the contract, and the goods must also, in fact, be in accordance therewith (*d*).

Words of estimate, as "about," "more or less," &c.

The use of words of estimate, as "about," "more or less," &c., shows "that the quantity is not restricted to the exact number or amount specified, but that the seller is to be allowed a certain moderate and reasonable latitude in the performance" (*e*). And the case in favour of a mere estimate is stronger when the word "say" is added to "about" (*f*). The question in all these cases is this, Are the words words of contract, or mere words of estimate?

The following rules were propounded in the American case of *Brawley v. United States* (*g*), which was approved in *The Steel Co. of Scotland v. Tancred & Co.* (*h*):—

- (1) The goods sold may be identified by surrounding circumstances, as, *e.g.*, all goods deposited in a certain warehouse, or to be shipped in a certain vessel, &c. In such cases the goods so identified are the subject-matter of the contract, and qualifying words are merely words of estimate, subject, however, to good faith on the part of the seller.
- (2) In default of such means of identification, the quantity named is material, subject (where there are qualifying words) to a reasonable latitude as regards quantity.
- (3) The qualifying words may in their turn be supplemented and governed by other stipulations or conditions, *e.g.*, so much as the buyer may require (*i*), or the seller be able to furnish (*k*), &c.

The above principles are exemplified in the illustrations to sub-s. 4, *post*, p. 193. It may here be mentioned that when the seller contracts to supply such goods as he may make within a specified time, at current prices for each delivery, he does not *prima facie* contract to carry on his business for that time, but only to supply such goods, *if* he makes them (*l*).

The rights and liabilities of the buyer.

Secondly, with regard to the rights and liability of the buyer. He may reject the goods, if less or more, or may accept them, *i.e.*,

(*d*) *Tamvao v. Lucas* (1859), 1 E. & E. 581, 592.

(*e*) Benj. p. 699, and see per Thesiger, L.J., in *Reuter v. Sala* (1879), 4 C. P. D. at p. 244.

(*f*) *Gwillim v. Daniell* (1835), 2 C. M. & E. 61; *M'Connell v. Murphy* (1873), L. R. 5 P. O. 203.

(*g*) 6 Otto. 168.

(*h*) (1889), 26 Sc. L. R. 305. See in H. L. (1890), 15 Ap. Ca. 125.

(*i*) See also *Steel Co. of Scotland v. Tancred*, *supra*.

(*k*) *Gwillim v. Daniell*, *supra*.

(*l*) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488; 60 L. J. Q. B. 734.

retain them under circumstances showing a *new* implied contract (within the meaning of s. 3) "to pay for them *their value*," not the stipulated price, as such, as the old contract has gone (*m*). "When some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value (not the stipulated price) of those goods" (*n*). Similarly, when the seller delivers in excess of the contract, his conduct amounts to a proposal of a new contract which the buyer may accept (*o*). The value to be paid is, of course, best determined by the contract rate.

When the buyer, under sub-s. 2, accepts the part contracted for out of an excessive delivery, he would be bound to pay for them also under s. 27. Sub-s. 2 further defines his rights under the offer of a *new* contract.

When the buyer, having accepted the part delivered, has already paid for the full quantity of the goods, and the seller makes default in delivering the remainder, "the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery . . . and acceptance of a portion only of the goods sold. This is in its nature a total failure of consideration for part of the price paid" (*p*), under s. 54, *infra*.

ILLUSTRATIONS [Delivery of short quantity].

S. 30 (1).

1. A. agrees to sell to B. 100 bags of hops deliverable on or before January 1st. A., before that day, delivers twelve bags, and next day demands payment. B. is not liable for the price of the twelve bags, as he has the option to return them by January 1st, A. not having completed his delivery. *Waddington v. Oliver* (1805), 2 B. & P. N. R. 61.

2. A. agrees to sell B. 250 bushels of wheat by a certain date. A. delivers 130, which B. keeps after that date. B. must pay for them, as he has lost his option of return by acceptance. *Oxendale v. Wetherell* (1829), 9 B. & C. 386.

ILLUSTRATIONS [Delivery of excessive quantity].

S. 30 (2).

1. B. orders of A. two dozen of port and two dozen of sherry. A. sends four dozen of each. B. returns three dozen of sherry, and all the port except one bottle. B. is liable to pay for only one dozen of sherry and one bottle of port. *Hart v. Mills* (1846), 15 M. & W. 85.

2. B. orders of A. ten hogsheads of claret. A. sends fifteen. B. tests the wine, and rejects the whole. He is not liable to pay for it. *Cunliffe v. Harrison* (1851), 6 Ex. 903.

(*m*) See also *Benj.* p. 57.

(*o*) Per Parke, B., in *Cunliffe v.*

(*n*) Per Bayley J., in *Shipton v. Casson* (1826), 5 B. & C. at p. 388.

Harrison (1851), 6 Ex. at p. 906.

(*p*) *Benj.* p. 398, quoting *Devauz v. Connolly* (1849), 8 C. B. 640.

S. 30 (3).

Mixed with goods of a different description.—The rule laid down in the cases prior to the Act (*q*) was that, if there were risk, trouble, or expense in the severing of the goods contracted for from the other goods, the buyer might reject the whole. And “risk” included the risk of an implied acceptance of all. The rule is now stated in the Act without limitation.

In *Imperial Bank v. Cowan* (*r*) the bill of lading including other goods was specially indorsed so as to allow the buyer to take delivery without trouble or expense, and it was held a good delivery. In such a case the goods are presumably not “mixed” with others.

ILLUSTRATIONS.

1. B. orders of A. a quantity of crockery. A. sends the crockery packed in a crate with other china of a different pattern not ordered, though distinguishable therefrom, and includes the whole in one invoice, with prices attached. B. may refuse to accept any of the china. *Levy v. Green* (1857), 1 E. & E. 969.

2. B. orders of A. a quantity of Ruabon coals. A. delivers one lot of Ruabon coals, and subsequently another lot of another coal, which he shoots in one heap with the rest. A. has made a bad delivery of the whole. *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620.

S. 30 (4).

Subject to any usage of trade, &c.—S. 55, *infra*, provides, in addition to this sub-section, that any right, duty, or liability may be negated or varied by express agreement, course of dealing, or usage of trade, “if the usage of trade be such as to bind both parties.”

Usage of trade.—The incorporation of trade usages is made in contracts “upon the principle of presumption that . . . the parties did not mean to express the whole of the contract by which they intended to be bound, but a contract with reference to those known usages” (*s*). But the presumption would, of course, be rebutted if the usage were inconsistent with the terms of the contract (*t*).

Moore v. Campbell (*u*) is an instance of a trade usage controlling the quantity of the goods delivered.

Special agreement.—By agreement the buyer may be bound to accept less than the amount of the goods mentioned in the contract (*x*), or an instalment of the goods ordered (*y*). The

(*q*) *Levy v. Green* (1859), 1 E. & E. 969; *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620; *Rylands v. Kreitman* (1865), 19 C. B. N. S. 351; *Tarling v. O'Riordan* (1878), L. R. Ir. 2 C. L. 82.

(*r*) (1873), 29 L. T. N. S. 52.

(*s*) Per Parke, B., in *Hutton v. Warren* (1836), 1 M. & W. at p. 475.

(*t*) Steph. on Ev., s. 90 (5) (3rd ed.). See also notes to *Wigglesworth v. Dallison*, 1 Sm. L. C. (9th ed.) p. 569.

(*u*) (1854), 10 Ex. 323.

(*x*) *Graham v. Jackson* (1811), 14 East, 498.

(*y*) s. 31 (1), *post*, p. 194, and *Brandt v. Lawrence* (1876), 1 Q. B. D. 344.

contract, in fact, may, by agreement, be divisible in performance. So also he may be bound by agreement to accept a quantity of goods within certain limits, as where "more or less" of goods are ordered. See on this, notes to sub-s. 1, *ante*, p. 190.

S. 30 (4).

Course of dealing.—This, when not varied by the terms of the contract, would be evidence of the fact of agreement.

ILLUSTRATIONS.

1. A. agrees to sell and deliver to B. from a particular warehouse fifty tons of hemp. A. tenders to B. two delivery orders for "about" thirty and twenty tons respectively. There is a usage of trade for warehousemen to accept delivery orders only in this form, as freeing them from responsibility for the exact quantity. A. has made a good tender. Per Cur. in *Moore v. Campbell* (1854), 10 Ex. 323.

2. A. agrees by two contracts to sell to B. two amounts of 4,500 quarters of oats, more or less, shipment to be by steamer or steamers during February, and payment to be made in cash in exchange for shipping documents. A. ships in the W. in time 4,511 quarters to answer the first contract, and 1,139 quarters to answer the second. He also ships in the O., but out of time, the balance of the second contract. B. must accept the 1,139 quarters of the second contract, although the balance was out of time, the contract being divisible by reason of the words "steamer or steamers." *Brandt v. Lawrence* (1876), 1 Q. B. D. 344 (2).

3. A. agrees to sell to B. 300 tons of Campeachy logwood of real merchantable quality, such as may be determined to be otherwise, to be rejected. Sixteen tons of the delivery are not Campeachy logwood. B. must accept and pay for the balance of 284 tons, the contract being by express agreement divisible. *Graham v. Jackson* (1811), 14 East, 498.

4. A. agrees to sell to B. about 300 quarters, more or less, of foreign rye. B. pays for 300 quarters. A. ships 345 quarters, and insists upon B. accepting that amount. B. may repudiate the contract and recover the price paid, as A.'s tender was (though some latitude was allowed by agreement) excessive. *Cross v. Eglin* (1831), 2 B. & Ad. 106.

5. A. agrees to sell to B. all the naphtha he may make during two years—"say, from 1,000 to 1,200 gallons a month." During ten months, A. delivers only 3,000 gallons, being all that he actually made. A. is not liable to B. for non-delivery of the excess of 7,000 gallons, as A. never undertook to sell more than he produced. *Gwillim v. Daniell* (1835), 2 C. M. & B. 61 (a).

6. A. agrees to sell B. all the combing skin which he may pull within a certain period, "say not less than 100 packs." A. must deliver to B. not less than 100 packs, as a minimum quantity was expressly provided for. *Leeming v. Snaith* (1851), 16 Q. B. 275.

7. A. agrees to sell to B. a specific heap of iron then lying in A.'s yard, and erroneously estimated by both to contain about 150 tons. It in fact contains forty-four. A. delivers all the iron. A. has performed his contract, having delivered the specific heap contracted for. *McLay v. Perry* (1881), 44 L. T. N. S. 152.

(2) As explained in *Reuter v. Sala* (1879), 4 C. P. D. at p. 250. The case, however, is a difficult one to under-

stand on the facts.

(a) Followed in *M'Connell v. Murphy* (1873), L. R. 5 P. C. 203.

S. 30 (4).

8. A. agrees to sell to B. the cargo of the P. consisting of about 1,300 quarters of corn, "the quantity to be taken from the bill of lading." A. sends B. the bill of lading showing 1,667 quarters with an invoice stating the price as calculated from the quantity stated in the bill, and B. pays therefor. The quantity actually delivered was 1,614 quarters. B. cannot recover the price paid by him for the deficit, as both parties agreed to take the quantity from the bill of lading. *Covas v. Bingham* (1853), 2 E. & B. 836.

Instalment
deliveries.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

S. 31 (1).

This sub-section, in effect, declares that a contract of sale is, *prima facie*, an entire contract, i. e., not divisible in performance. It is really a re-statement of s. 30 (1), as modified by s. 30 (4), *ante*, p. 188.

If the buyer accepts an instalment, an implied contract to pay its value arises under ss. 30 (1) and (3), *ante*, p. 191.

Parke, J., gives the following statement of the rule (b): "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, *because the purchaser may*, if the vendor fail to complete his contract, *return the part delivered*. But if he retain the part delivered after the seller has failed in performing his contract,

(b) *Ozendale v. Wetherell* (1829), 9 B. & C. at p. 387; *Champion v. Short* (1807), 1 Camp. 53.

the latter may recover *the value* of the goods which he has so delivered".(c). S. 31 (1).

The general rule of law (now adopted by the Act) was that a contract for the sale of several things at the same time, or otherwise, as one transaction, is, *prima facie*, an entire contract for the whole of the goods, though separate prices may be fixed (d), and though some of the goods are future goods(e). And the making by the parties of a single memorandum embodying all the sales is a relevant fact to prove entirety (f).

Unless otherwise agreed. — A different intention may be proved, as, e. g., when, from the nature of the case, the whole quantity cannot be delivered at or about the same time, and when the quantities first delivered are actually consumed before the expiration of the period limited for complete delivery (g).

In auction sales the presumption is reversed(h); but there, too, the purchase of several lots may be proved to be entire (i).

ILLUSTRATIONS.

1. A. agrees to sell to B. twenty-five tons of pepper, more or less, of October ^{and} or November shipment, per sailing vessel or vessels, the name of the vessel or vessels, marks and particulars, to be delivered within sixty days of the bill of lading. A. declares, within the sixty days, twenty-five tons of pepper shipped in the B., of which five tons were shipped in December. B. is not bound to take the twenty tons shipped in time, as the provision, that shipment could be made "by vessel or vessels," merely allowed A. to ship twenty-five tons by different vessels, if he pleased, and did not also render the contract divisible as regards performance. *Reuter v. Sala* (1879), 4 C. P. D. 239 (k).

2. A. agrees to sell B. one hundred bags of hops, deliverable by a certain date. A. delivers an instalment of twelve bags, and then demands the price of them. B. is not bound to accept the twelve bags, nor pay for them, unless he retains them after the appointed date. If he so retains them (l), he must pay their value. *Waddington v. Oliver* (1805), 2 B. & P. N. R. 61.

To be delivered by stated instalments.—This sub-section is based upon the law laid down in *Mersey Steel and Iron Co. v. Naylor* (m), and says, in effect, that it is a question of fact whether S. 31 (2).

(c) Quoted in *Col. Ins. Co. of New Zealand v. Adelaide Mar. Ins. Co.* (1886), 12 Ap. Ca. at pp. 138, 139. Co. supra, at p. 138.
(d) *Baldry v. Parker* (1823), 2 B. & C. 463. (h) See s. 58 (1).
(e) *Dykes v. Blake* (1838), 4 B. N. C. 463.

(f) *Scott v. Eastern Counties Ry. Co.* (1843), 12 M. & W. 33. (k) Cf. with this case *Brandt v. Laurence* (1876), 1 Q. B. D. 344, a case very difficult to understand.
(g) *Bigg v. Whisking* (1853), 14 C. B. 195. (l) *Ozendale v. Wetherell* (1829), 9 B. & C. 386.

(h) *Per Cur. in Col. Ins. Co. of New Zealand v. Adelaide Mar. Ins.* (m) (1884), 9 Ap. Ca. 434.

S. 31 (2).

a partial breach of a divisible contract is a discharge to the other party if he chooses to accept it, or whether he is bound to seek compensation only under ss. 49 and 50.

The "neglect or refusal" may be looked upon in two aspects, viz., as the non-fulfilment of a condition (*n*), under ss. 1 (2) or 10 (1), which can only be when, as Lord Blackburn says in the above case (*o*), "the whole [quantity], and no less, is of the essence of it," as in *Honck v. Muller* (*p*); or as evidence of an intention no longer to be bound by the contract, whether or not the particular breach is of an essential stipulation or condition. In both cases, the other party may treat the neglect or refusal as a wrongful repudiation; but otherwise, these two aspects are distinct (*q*).

In the determination of the above question, no distinction is to be made between contracts wholly unperformed and partly performed (*r*). In every case "you must look at the circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part" (*s*). And the other party may or may not accept the renunciation: the refusal, in fact, "must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continues to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end" (*t*).

If the party entitled to do so accept the repudiation, he may recover the value of the goods actually delivered, as by an implied contract under s. 3, *supra* (*u*).

Defective deliveries.—These words should not, it is conceived, be limited only to *short* deliveries; but should also include *default* in delivery.

Terms of the contract.—Thus, *e.g.*, a certain delay may be provided for by the contract in specified contingencies (*x*).

(*n*) Per Lord Selborne, *Mersey Steel and Iron Co. v. Naylor* (1884), 9 Ap. Ca. at p. 439.

(*o*) At p. 444.

(*p*) (1881), 7 Q. B. D. 92.

(*q*) See the judgments of Lords Selborne and Blackburn in *Mersey Steel and Iron Co. v. Naylor*, *supra*.

(*r*) Per Cur. S. C. 9 Q. B. D. 648;

and per Lord Bramwell in *H. L.*

(*s*) Per Lord Selborne, *ibid.* pp. 438, 439.

(*t*) Benj. p. 548, quoted in *Gueret v. Audouy* (1893), 62 L. J. Q. B. at p. 638.

(*u*) *Bartholomew v. Markwick* (1864), 15 C. B. N. S. 710.

(*x*) *De Oleaga v. West Cumberland, &c. Co.* (1879), 4 Q. B. D. 472.

Circumstances of the case—e.g., long delay, or notice of insolvency, and omission by the buyer to tender cash (y), may be evidence of an intention to repudiate the contract. A notice of insolvency was defined in *In re Phoenix Bessemer Steel Co.* (z), as a notice “of inability to pay, avowed either in act or word.”

S. 31 (2).

ILLUSTRATIONS.

1. A. & Co. agree to sell to B. & Co. 5,000 tons of steel, deliverable 1,000 tons monthly, payment within three days of receipt of shipping documents. A. & Co. in the first month make a short delivery, and another in the early part of the second month. A petition is then presented to wind up A. & Co. B. & Co. then, on the erroneous advice of their solicitor that A. & Co. could not give B. & Co. a discharge, decline, pending the petition, to pay A. & Co. for instalments already delivered except under sanction of the Court. The price of steel was then higher than the contract price. A. & Co. then repudiate the contract. A. & Co. are liable for damages for non-delivery of the remaining instalments, as B. & Co.'s refusal was, under the circumstances, no refusal to be bound by the contract; but only a declaration of their embarrassment. *Mersey Steel and Iron Co. v. Naylor* (1884), 9 Ap. Ca. 434.

2. A. agrees to sell to B., by specified instalments during certain months, a quantity of straw, payment to be made on each delivery. After several instalments have been delivered and paid for, B. expressly refuses to pay for the next instalment, and insists upon keeping the price of an instalment in hand. A. may repudiate the contract, as B.'s refusal showed an intention no longer to be bound thereby. *Withers v. Reynolds* (1831), 2 B. & Ad. 882.

3. A. agrees to sell to B. 250 tons of iron in two instalments, payment to be made in cash fourteen days after each delivery. The first instalment is much delayed, but is ultimately delivered, but B. refuses to pay for it, claiming to set off his loss on A.'s breach of contract, but at the same time demands delivery of the remaining 125 tons. The market is rising. B.'s refusal to pay for the first 125 tons is, under the circumstances, no refusal to be bound by the contract, and A. is liable to deliver the remaining 125 tons. *Freeth v. Burr* (1874), L. R. 9 C. P. 208.

4. A. & Co. agree to sell to B. & Co. a quantity of iron by monthly instalments, to be paid for by bills for each instalment. Several instalments are delivered, and then B. & Co., being short of working capital, but not insolvent, call their creditors together and ask for an extension of credit, which is refused by the creditors. A. & Co. then refuse to make any more deliveries except for cash, and B. & Co. then repudiate the contract. B. & Co. are entitled to repudiate the contract on A. & Co.'s express refusal to abide by its terms, as B. & Co., under the circumstances, had not made a declaration of insolvency justifying A. & Co. in demanding cash. *In re Phoenix Bessemer Co.* (1876), 4 Ch. D. 108.

5. A. agrees to sell B. as many colliery screenings as he may require, and B. agrees to manufacture thereout “duff coal” and “nuts,” and to resell the same to A., the agreement to continue six years. Disputes arise as to the performance of the contract on both sides, and B. stops his works, saying he will not go on until A.

(y) *Ex parte Stapleton* (1879), 10 Ch. D. 586; *Ex parte Chalmers* (1873), 8 Ch. 289. (z) (1876), 4 Ch. D. 108, per Bramwell, L.J., at p. 122.

S. 31 (2). properly performs his contract, and the dispute is settled. B. has not refused to be bound by the contract, but merely requires the ascertainment of his and A.'s mutual rights. *Gueret v. Audouy* (1893), 62 L. J. Q. B. 633.

6. A. agrees to sell B. 200 tons of iron deliverable by April 1st. Before that date B. becomes insolvent, and informs A. of the fact, but does not tender cash for the goods. In May, iron having risen in price, B. demands delivery. A. may repudiate the contract, as B.'s default was, under the circumstances, an offer to rescind which A. may accept. *Morgan v. Bain* (1874), L. R. 10 C. P. 15.

Delivery to
carrier.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

S. 32 (1). The delivery to a carrier is also *prima facie* an appropriation of the goods under s. 18, rule 5 (2), *ante*, p. 129; but does not constitute an "acceptance" under s. 4 (3), see *ante*, pp. 30, 35.

The goods.—The goods contracted for, *i.e.*, answering to the contract (a).

(a) Per Parke, B., in *Wait v. Baker* (1848), 2 Ex. 1.

Seller is authorized . . . to send the goods.—Under this sub-section the seller may be either “authorized,” *i.e.*, apparently independently of the terms of the contract, or “required,” *i.e.*, by such terms, under s. 29 (1), to deliver the goods to a carrier. The rule on the subject is thus stated by Mr. Benjamin (*b*):—“When the seller is bound to send the goods to the buyer, the rule is well established . . . that delivery to a common carrier, *a fortiori*, to one specially designated by the buyer [‘whether named by the buyer or not’] is a delivery to the buyer himself; the carrier being, in contemplation of law in such cases, the bailee of the person to whom, not by whom, the goods are sent; the latter when employing the carrier being regarded as the agent of the former for that purpose.”

It has never been directly decided whether a delivery to a carrier *abroad* on behalf of a buyer in this country is a good delivery. The point was touched upon in argument, but not decided, in *Brown v. Hodgson* (*c*), and Grove, J., in *Pointin v. Porrier* (*d*), expressed a doubt whether such was a good delivery. The question would appear to depend upon whether the buyer, expressly or impliedly, assumed the risk, or whether from the facts of the case the seller must be taken to have agreed to take it upon himself (*e*).

The rule in this sub-section applies although the carrier afterwards tortiously refuse delivery to the buyer (*f*).

In pursuance of a contract of sale.—*i.e.*, in performance of the seller’s *duty* to deliver. Thus, delivery to a carrier under a contract of “sale or return,” or similar terms, would be no delivery to the consignee (*g*).

Prima facie.—But the seller may, under s. 19, *ante*, p. 136, control the effect of the delivery to the carrier, as, *e.g.*, by taking the bill of lading to his own, or some third person’s order (*h*). “The delivery of goods contracted for on board a ship, when a bill of lading is taken, is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and this may apply equally when the ship is the ship of the vendee” (*i*).

(*b*) pp. 164, 702, quoting *Daves v. Pack* (1799), 8 T. R. 330; *Dunlop v. Lambert* (1839), 6 C. & F. 600; and other cases.

(*c*) (1809), 2 Camp. 36.

(*d*) (1885), 49 J. P. 199.

(*e*) See on this per Cur. in *Calcutta, &c. Co. v. De Mattos* (1863), 32 L. J.

Q. B. 322.

(*f*) *Groning v. Mendham* (1816), 5 M. & S. 189.

(*g*) *Swain v. Shepherd* (1832), 1 M. & R. 223. See s. 18, Rule 4.

(*h*) See Benj. p. 369, and cases cited.

(*i*) Per Cleasby, B., in *Gabarron v. Kreeft* (1875), L. R. 10 Ex. at p. 285.

S. 32 (1).

So also there is no delivery to the buyer "if the seller should sell goods undertaking to make delivery himself at a distant place (i.e., 'the place other than that where they are when sold' under s. 33), thus assuming the risks of carriage." In that case "the carrier is the seller's agent" (*j*), and there is no delivery to the buyer.

In the same way, delivery to a carrier may be sufficient, so far as the seller's obligation to deliver is concerned, and yet, by agreement, the latter may, with respect to *payment* of the price, take the risk of the goods arriving, either at all (*k*) or in a merchantable condition (*l*).

ILLUSTRATIONS.

1. B. orders goods of A. to be dispatched to him in London. A. delivers the goods at a common wagon office. A. then requests payment of the goods. B. refuses to pay until the goods arrive in London. B. is liable for the price of the goods on their dispatch. Per Cur. in *Dutton v. Solomonson* (1803), 3 B. & P. p. 582.

2. A., in Staffordshire, agrees to sell iron to B. and deliver it at Liverpool. A. has delivered the iron when it arrives at Liverpool, and not when he consigns it to a carrier. See *Bull v. Robison* (1854), 10 Ex. 342.

S. 32 (2).

The seller must make such contract with the carrier, &c.—

This sub-section is based upon *Clarke v. Hutchins* (*m*), *Cothay v. Tute* (*n*), and *Buckman v. Levi* (*o*).

Unless otherwise authorized.—See s. 55. The seller must duly follow any instructions of the buyer as to the mode of dispatch, otherwise the delivery will be ineffectual, and the seller not have performed his contract (*p*).

In the absence of such "other authorization," the rule is that "the seller is bound, when delivering to a carrier, to take the usual precautions for ensuring the safe delivery to the buyer" (*q*). In such a case the seller "has an implied authority, and it is his duty to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them in

(*j*) Benj. p. 702, quoting *Dunlop v. Lambert* (1839), 6 C. & F. 600. See also *Calcutta Co. v. De Mattos* (1863), 32 L. J. Q. B. 322, and a late American case of *M'Neal v. Braun*, 26 American St. R. 441.

(*k*) *Calcutta, &c. Co. v. De Mattos* (1863), *supra*.

(*l*) *Beer v. Walker* (1877), 25 W. R. 880, which, however, may also be explained as a case where, on

consignment, the goods did not answer the contract under s. 14 (2), *supra*, i.e., were not "the goods" under this section.

(*m*) (1811), 14 East, 475.

(*n*) (1811), 3 Camp. 129.

(*o*) (1813), 3 Camp. 414.

(*p*) *Ullock v. Reddelein* (1828), *Dans. & Ll.* 6; *Hills v. Lynch*, 26 N. Y. (Sup. Ct.) 42.

(*q*) Benj. p. 703.

such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers" (r).

S. 32 (2).

This sub-section in fact deals with the implied authority and duty of the seller, in the absence of any express authority.

If the seller omit.—In that case the buyer may "decline to treat the delivery as a delivery to himself," or may waive the informality of the delivery, and treat the seller's breach as a breach of contract, under s. 51 (1). He may also by negligence be precluded, on the ground of estoppel or waiver (preserved by s. 61 (2)), from saying that the delivery was bad (s).

ILLUSTRATIONS.

1. B. orders a machine of A., to be sent by any conveyance which would reach Bristol, A. to inform B. when it was sent off. A. delivers the machine to a carrier, who gives A. a receipt showing that the machine would go by the C. ship. A. duly informs B. of this. The carrier, however (the C. being full), according to custom, sends the machine by the D., and it arrives and remains at Bristol. B. for eighteen months never informs A. that the machine never arrived by the C. A. (having duly followed B.'s instructions) has made a good delivery; and, even if he were negligent in saying the goods went by the C., yet B., because of his negligent delay, cannot treat the delivery as bad. *Cooke v. Ludlow* (1806), 2 B. & P. N. R. 119.

2. B. orders goods of A. to be sent by sea. A. delivers the goods, of the value of 51*l.*, to C., a carrier, who had notoriously published a notice that he would not be liable for the loss of goods above the value of 5*l.*, unless entered and paid for as such. A. does not enter or pay for them accordingly. The goods are lost. B. is not bound to pay for them. *Clarke v. Hutchins* (1811), 14 East, 475.

3. B. orders a number of chairs of A. to be sent by sea. A. delivers the chairs at a wharf to a person who is not known to be the carrier's agent, nor does he book the chairs or take a receipt therefor. The chairs are lost. B. may treat the delivery as defective, and is not liable to A. for the price of the chairs. *Buckman v. Levi* (1813), 3 Camp. 414.

4. B. gives an order to A. for "more goods" to be sent by coach. A. delivers, without paying a special insurance on excess value, as required by the carrier. It is unusual to insure. A. can recover the price of the goods, unless B. shows that A. was in the habit of insuring in similar cases. *Cothay v. Tute* (1811), 3 Camp. 129.

Goods are sent . . . by a route involving sea transit.—This rule is adopted from the Scotch law. The authorities are set out in the note (t).

S. 32 (3).

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that

Risk where goods are delivered at distant place.

(r) Per Lord Ellenborough, in *Clarke v. Hutchins* (1811), 14 East, 475.

(s) *Cooke v. Ludlow* (1806), 2 B. & P. N. R. 119.

(t) Bell on Sale, p. 89; Brown on Sale, s. 526; 1 Bell, Prin. s. 118. Cases are stated in 1 Bell, Illustr. pp. 110 *et seq.*

s. 33. where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

This section adopts the rule stated in *Bull v. Robison* (u), where, however, it was applied to goods ordered from a *distant* place. The same principle is now applied to all cases where a transit is necessary.

The "risk" which the buyer is to undertake is that of necessary "deterioration." Other risks, such as loss or unusual deterioration (x), &c., would be regulated by express agreement, or according to the ownership of the goods, under ss. 20 and 32 (1). This section is also expressly limited to cases where the risk would otherwise be the seller's, as in *Bull v. Robison*, where he agreed to deliver the goods at their destination. If he performed his contract by delivery to a carrier, this being *prima facie* an appropriation of the goods under s. 18, Rule 5 (2), the further risk, whether of necessary deterioration or not, would fall on the buyer, unless the facts show, as in *Beer v. Walker* (y), that the seller *did not perform the condition of his contract*, unless the goods were able to stand the contemplated journey, i. e., if they were unable to arrive in a merchantable condition. Such a case falls under s. 14 (2), where it is quoted in illustration, *ante*, p. 97, but may also be an instance of a contract subject to an *implied* condition subsequent under s. 1 (2), enabling the buyer to *revest* the property in the seller, the latter having otherwise performed his contract by delivery to a carrier under s. 32 (1).

ILLUSTRATION.

A., a manufacturer in Staffordshire, agrees to sell to B. a quantity of hoop iron and to deliver it at Liverpool in the winter. A. delivers good merchantable iron to the carrier, but the iron was necessarily rusted and unmerchantable on arrival. A. has made a good delivery, as the deterioration of the goods was the necessary result of the transit to B., and B. must accept and pay for the goods. *Bull v. Robison* (1854), 10 Ex. 342.

Buyer's right
of examining
the goods.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and

(u) (1854), 10 Ex. 342.

(x) Per Alderson, B., in *Bull v. Robison*, *supra*; *Walker v. Langdale's*

Chemical Manure Co. (1873), 11 C. of S. Cas. (3rd ser.) 906.

(y) (1877), 25 W. R. 880.

until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

S. 34.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Which he has not previously examined.—The effect of examination is stated in s. 14 (2). The buyer may, of course, waive examination, under s. 11 (1) (a), as where he deals with the goods (z). But examination would not defeat his rights if the defect is latent: see ss. 14 (2), 15 (2) (c).

S. 34 (1).

“The buyer is entitled before acceptance to a fair opportunity of examining the goods, so as to see if they correspond with the contract. . . . In a word, as delivery and acceptance are concurrent conditions, it is enough to say that the vendee’s duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor” (a).

“[A buyer] cannot be said to accept that he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chose to send him; whereas he has a right to see whether in his judgment the goods sent correspond with the order” (b).

Sub-ss. 1 and 2 state the law as applying to substantially the same state of facts, but sub-s. 1 states the rule from the point of view of the buyer’s liability, and sub-s. 2 from that of the seller’s on the buyer’s request. In sub-s. 1 the act of delivery has been completed by the seller, and the question is whether the buyer also is to be bound thereby; in sub-s. 2 the act of delivery is incomplete, and amounts only to a tender, and the question is whether that tender is good.

S. 34 (1), (2).

The rules contained in this section are enunciated in a different way in s. 15 (2) (b), in cases of sales by sample.

A reasonable opportunity.—The seller is bound to afford the buyer “a reasonable” opportunity of inspection. But the request

(s) Per Cockburn, C.J., in *Castle v. Swoorder* (1861), 30 L. J. Ex. 310.

(b) Per Alderson, B., in *Hunt v. Hocht* (1853), 8 Ex. 814.

(a) Benj. pp. 709, 710.

S. 34 (1). therefor must be made "at a proper and convenient time" (c). And the opportunity afforded must be *at the place*, expressly or by implication, *appointed* for inspection (d). And this place is *prima facie* the place of delivery (d). But when the goods contain a latent defect not discernible by an ordinary inspection at the place of delivery, the buyer may reject at the first place and time that he is enabled to make a *real* inspection (e).

Brett, J., says, in *Heilbutt v. Hickson* (e): "If the time of inspection, as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them *then and there* on the hands of the seller." The judgment of the same learned judge in *Grimoldby v. Wells* (f) is to the same effect.

ILLUSTRATIONS.

1. A. agrees to sell B. two parcels of wheat. B. calls at A.'s premises to examine the bulk, and sees the bulk of one parcel, but is refused inspection of the other. B. has not accepted the wheat, and may repudiate the contract as to both parcels. *Lorymer v. Smith* (1822), 1 B. & C. 1.

2. A. agrees to sell to B. by sample twenty-five quarters of barley, deliverable at T. station where inspection is possible. B. resells the barley to C. at S. B.'s opportunity of inspection arises at T. station, and not on delivery at S., as delivery was not contemplated there. *Perkins v. Bell* (1892), 62 L. J. Q. B. 91.

3. A. agrees to sell B. by sample four quarters of tares, deliverable into B.'s carts, to be taken to B.'s barn. B.'s opportunity of inspection is here not the place of delivery, the place of inspection contemplated being B.'s barn. *Grimoldby v. Wells* (1875), L. R. 10 C. P. 391.

4. A. agrees to sell to B. by sample 30,000 pairs of shoes for the use of the French army, deliverable at a wharf in London, to be inspected and quality approved before shipment. B. inspects and approves, and pays for the shoes, which are then forwarded to L. in France. The shoes and also the sample contain a latent defect of manufacture not discoverable except by cutting them open, which is done at L. B. has no reasonable opportunity of inspecting the shoes in London, as that inspection was nugatory by the acts of A., and his real opportunity does not arise except at L., which place was impliedly substituted as the place of inspection. *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438.

S. 34 (2). 5. A. agrees to sell to B. a quantity of hats which B. has not previously seen. A. sends the hats in closed casks to a wharf, giving notice to B. that the hats are in the casks, and that they would be delivered on payment. A.'s agent refuses to allow B. to examine the casks.

(c) *Lorymer v. Smith* (1822), 1 B. & C. 1.

(e) *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438.

(d) *Perkins v. Bell* (1892), 62 L. J. Q. B. 91.

(f) (1875), L. R. 10 C. P. 391.

A. cannot recover the value of the hats from B., or damages for non-acceptance, as his own tender was defective. *Isherwood v. Whitmore* (1843), 11 M. & W. 347. S. 34 (2).

6. A. sells to B. by auction by the yard a quantity of goods to be paid for before delivery. The goods are open to inspection before the sale. B. claims to inspect and measure the goods before payment, and, this not being allowed, refuses to accept and pay for them. B. is liable for non-acceptance of the goods, as by the contract A. was not bound to allow inspection to B. before payment. *Pettitt v. Mitchell* (1842), 4 M. & G. 819.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance.

Acceptance within this section takes place by—

- (1.) Intimation of acceptance:
- (2.) Acts of ownership:
- (3.) Undue detention without notice of rejection.

S. 35.

It will be seen that many of the cases which show that a buyer has accepted the goods tendered to him in performance of the contract, and thus become owner, are also authorities to show that the buyer has accepted the goods within the meaning of s. 4 (3). But the distinction pointed out in the notes to that section must be borne in mind, viz., that some acts may constitute an acceptance within the meaning of s. 4 (3), without at the same time being an acceptance under this section.

“When goods are sent to the buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing, and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time; or if any act be done by the buyer which he would have no right to do unless he were owner of the goods” (g).

And so the parties may agree upon a certain test as conclusive, and this would modify the buyer's rights under this section (h). See s. 55.

(g) Benj. p. 711.

23 Sc. L. R. 626; *Mackay v. Dick*

(h) *Bradley & Co. v. Dollar* (1886), (1881), 6 Ap. Ca. 251.

S. 35.

When goods are sent on sale or return, or on approval (see s. 18 (4)), the same acts that show an assent to a sale also show an acceptance, *i.e.*, an "adoption of the transaction" within that section (i).

Act inconsistent.—Breaking bulk is not necessarily such an act (k).

A reasonable time.—This is a question of fact under s. 56.

The time may also be expressly laid down in the contract, as in *Sharp v. Great Western Railway Co.* (l), where a certain time of trial was provided for; and this even though the defect was latent (l): or it may be implied by custom under s. 55 (m).

In determining what is a reasonable time for the rejection of goods, or whether any act done is inconsistent with the seller's ownership, regard shall be had to the seller's conduct in allowing a further trial or otherwise (n).

ILLUSTRATIONS.

1. B. selects from A.'s flock forty-five couples of ewes and lambs, and directs A. to send them to a field of his at W. B., before seeing them, orders his servant to take them to M., where B. counts them, and says "all right." Whether or not B. had accepted the sheep prior to delivery, there is evidence (as he had previously selected them) that B.'s saying "all right" meant an express intimation of acceptance. *Saunders v. Topp* (1849), 4 Ex. 390.

2. A. agrees to sell to B. by sample some rice. On delivery B. draws fresh samples which prove inferior to the sample by which he bought, and then attempts to sell the lot by auction. B. has done an act inconsistent with A.'s ownership after knowing his right of rejection, and has consequently accepted, and must pay for, the rice. *Parker v. Palmer* (1821), 4 B. & A. 387 (o).

3. A. agrees to sell to B. a quantity of seed to be harvested and thrashed by A., and delivered to B. A. delivers the seed, which B. says is out of condition, and refuses to take it. B. then spreads out the seed, claiming to be doing so by authority of A., which A. denies. B. has accepted the seed, if he spread it out as an owner dealing with his own, but not if he be acting under A.'s authority, or merely to preserve it on A.'s behalf, if perishable. *Parker v. Wallis* (1855), 5 E. & B. 21.

4. A. agrees to sell B. twenty-five sacks of flour. On delivery he uses half a sack, and then says that the flour was not according to contract; nevertheless, he uses two more sacks, and sells one. B.'s acts are inconsistent with A.'s ownership, and he has accepted all the flour. *Harnor v. Groves* (1855), 15 C. B. 667 (p).

(i) Benj. p. 67.

(k) *Wallace v. Robinson & Co.* (1885), 22 Sc. L. R. 830.

(l) (1841), 9 M. & W. 7.

(m) *Sanders v. Jameson* (1848), 2 C. & K. 557.

(n) Per Bovill, C.J., in *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438,

quoting *Adam v. Richards* (1795), 2 H. Bl. 573. See also *Lucy v. Moufflet* in Illustrations.

(o) See also *Chapman v. Morton* (1843), 11 M. & W. 534.

(p) See also *Hopkins v. Appleby* (1816), 1 Stark. 477.

5. B. orders of A. a hogshead of cyder according to sample, and taps it on delivery, and finding it bad writes to say that he would have to return it if his customers continued to complain. A. does not reply, and B. a month after complains again, and then returns the cyder, having consumed about twenty gallons. B. has not accepted the cyder, as A.'s silence amounted to an acquiescence on his part to B.'s making a further trial. *Lucy v. Moufflet* (1860), 5 H. & N. 229.

S. 35.

6. A. agrees to sell to B. by sample certain corn. There is a custom of the market that the buyer should be allowed only one day for objecting to the quality. B. lets the day pass without objection. B. has accepted the corn. *Sanders v. Jameson* (1848), 2 C. & K. 557.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods.

This section embodies the law laid down in *Grimoldby v. Wells* (q).

S. 36.

Unless otherwise agreed.—See s. 55.

Having the right so to do.—"The buyer's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the seller" (r); on a *wrongful* rejection the seller's remedy is under s. 50 (1).

The *effect* of a rightful rejection is that the "parties are in the same position as if the seller had done nothing under the contract. There is no specific appropriation, and no transfer of property, and the seller, if delivery under the contract is due, is liable to an action for non-delivery" (s) under s. 51 (1).

Not bound to return them.—The buyer may exercise his right of rejection of the goods by giving prompt notice thereof to the seller, or by doing any unequivocal act signifying his rejection, and is not bound to return them to the seller, or to place them in any neutral custody (t). But the buyer, after the rejection of the goods delivered, must act in relation thereto in a reasonable manner. Subject thereto, the goods, after a rejection duly made, are at the risk of the seller (u).

The buyer, after a rejection duly made, would thus appear to be in the position of an involuntary bailee of the goods, as in

(q) (1875), L. R. 10 C. P. 391.

(r) Benj. p. 710.

(s) Campbell on Sale (1st ed.) p. 387.

(t) Per Bayley, J., in *Okell v.*

Smith (1815), 1 Stark. 107; *Grimoldby*

v. Wells, *supra*, explaining the head note in *Couston v. Chapman* (1872), L. R. 2 Sc. App. 250.

(u) *Okell v. Smith*, *supra*.

S. 36.

the analogous case of a carrier after a refusal of the consignee to receive (*x*), and, if he have tendered the goods back to the seller, he is entitled to his reasonable charges for their keep (*y*).

But the act of refusal must be unequivocal, and the buyer cannot annex conditions (*z*).

Liability of
buyer for
neglecting or
refusing
delivery of
goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

S. 37.

This section is based upon the opinion of Lord Ellenborough in *Greaves v. Ashlin* (*a*), and of Bayley, J., in *Bloxam v. Sanders* (*b*); in the former of which cases the learned judge says:—"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them if he be prejudiced by the delay." Both of the rights, which are rights *in personam*, would be enforceable under s. 57, and not seemingly under s. 50 (1).

The seller, however, will not be entitled to add any expenses incurred by reason of his retention of a lien under s. 39, as these charges are for his own benefit, and therefore no contract by the buyer to pay them would be presumed (*c*). See notes to s. 39, (1) (*a*), *post*, p. 217.

(*x*) *Hough v. London & North Western Ry. Co.* (1870), L. R. 5 Ex. 51; and in *America, Dailey v. Green*, 15 Penn. 118, where the goods after rejection were destroyed by the buyer's negligence.

(*y*) *Carroll v. Coare* (1809), 2 Camp. 82; 1 Taunt. 566; *Chesterman v. Lamb* (1834), 2 A. & E. 129.

(*z*) *Jardine v. Pendreigh* (1869), 6 Sc. L. R. 272; *Howard v. Hayes*, 47

N. Y. (Sup. Ct.) 89.

(*a*) (1813), 3 Camp. 426. See also, in *America, Dibble v. Corbett*, 5 Bosw. 202.

(*b*) (1825), 4 B. & C. p. 950. See also per Lord Cranworth in *Somes v. British Empire Shipping Co.* (1858), E. B. & E. 353.

(*c*) *Somes v. British Empire Shipping Co.*, *supra*; *Crommelin v. New York, &c. Ry. Co.*, 4 Keyes, 90.

The seller, in fact, is, under this section, like the buyer, after a rightful refusal to accept under s. 36, in the position of an involuntary bailee of the goods, but presumably would be bound to only slight diligence in the care and custody, the valuable consideration in the sale being exhausted by the lapse of a reasonable time for delivery: according to the principle of the Roman law "*cum moram emptor adhibere cepit, jam non culpam sed dolum tantum præstandum a venditore*" (d). See the notes to s. 20, ante, p. 146. That section also shows that if the buyer's delay amounts to a "fault," as defined in s. 62 (1), he will also be liable to take the risk of any loss which might not otherwise have happened.

S. 37.

Provided that, &c.—The "rights of the seller" are, in this instance, to treat the contract as at an end, thus freeing himself from further liability, and to look to the buyer for compensation (e). See on this, s. 31 (2).

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38.—(1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

Unpaid seller defined.

- (a) When the whole of the price has not been paid or tendered;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

The seller of goods.—In this part of the Act (ss. 38 to 48 inclusive) the definition of a seller given in s. 62 (1) is extended. See sub-s. 2, post, p. 212.

S. 38 (1) (a).

The whole of the price.—The unpaid seller may exercise his rights, notwithstanding a partial payment of the price (f). But

(d) Poth. Contr. de Vente, 55.

(e) Per Lord Blackburn in *Morsey Steel and Iron Co. v. Naylor* (1884), 9 Ap. Ca. at pp. 442, 443.(f) *Hodgson v. Loy* (1797), 7 T. R. 440; *Feiss v. Wray* (1802), 3 East, 93; *Edwards v. Brewer* (1837), 2 M. & W. 375; *Van Casteel v. Booker* (1848), 2 Ex. 691; Benj. p. 848.

S. 38 (1) (a). when the contract is divisible, and payment has been made in respect of a portion of the goods, the seller is *pro tanto* paid, and can only exercise his rights as unpaid seller over the portion which remains unpaid for (*g*).

For the seller's rights on the buyer's insolvency before the commencement or the completion of delivery, of goods deliverable by instalments, see notes to s. 39 (2), *post*, p. 218.

Paid or tendered.—"It is the buyer's duty, under the contract, to make actual payment in cash, or a tender of payment (*h*), which is as much a performance and discharge of his duty as an actual payment.

"A tender is only validly made when the buyer produces and offers to the seller an amount of *money equal* to the price of the goods. But the actual production of the money may be dispensed with by the seller. The Courts, however, have been rigorous in requiring proof of a dispensation with the production of the money" (*i*).

The existence of an account current between seller and buyer which is unsettled, so that the balance of account between them is uncertain, will not prevent the seller from exercising his right, as "unpaid" seller, of stopping the goods *in transitu* (*j*). In the case, however, of the seller consigning goods specifically in discharge of his liability to the buyer on the balance of account, it is, perhaps, doubtful whether he can afterwards exercise his rights as unpaid seller (*k*).

S. 38 (1) (b). **When a bill of exchange . . . has been received, &c.**—"Bill of exchange" is defined in s. 3 of the Bills of Exchange Act, 1882, and by s. 73 it includes cheques, and by s. 89 (1) promissory notes. As to "other negotiable instruments," see the notes to *Miller v. Race* (*l*); and per Manisty, J., in *London and County Banking Co. v. London and River Plate Bank* (*m*).

The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any

(*g*) *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205.

(*h*) *Martindale v. Smith* (1841), 1 Q. B. 389.

(*i*) Benj. pp. 720 *et seq.*, where all the cases are cited.

(*j*) *Wood v. Jones* (1825), 7 D. & R. 126.

(*k*) See *Vertue v. Jewell* (1814), 4 Camp. 31, and the criticism thereof in Blackb. at p. 331, and in Benj. at p. 849, where it is stated that the case, if correctly reported, is "very questionable law."

(*l*) 1 Sm. L. C. (9th ed.) p. 502.

(*m*) (1887), 20 Q. B. D. at p. 238.

agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the seller's right to the price reviving on non-payment of the security. But if a dispute arise as to the intention of the parties, the question is one of fact for the jury (*n*). The intention to take a bill in absolute payment for goods sold must be clearly shown (*o*), and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods (*p*) or "in discharge" of the price (*q*). Lord Kenyon said, in *Stedman v. Gooch* (*r*), that "the law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable, and default is made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer in his hands, and who, therefore, refuses to accept it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor"; and this *dictum* was quoted by Tindal, C.J., in *Maillard v. The Duke of Argyle* (*s*) to show that the word "payment" does not necessarily mean "payment in satisfaction and discharge" (*t*).

But the payment *may* be treated as unconditional; as where the buyer offers to pay the price in cash, and the seller takes a negotiable security in preference (*u*). And so, also, if the seller have negotiated the security, *without rendering himself liable* thereupon, he is paid in every sense of the word (*v*).

It must be remembered that, even when the security is taken only in *conditional* payment of the price, the seller is for the time a *paid* and not an unpaid seller, and the buyer is entitled to demand possession of the goods (*w*). See s. 41 (1) (*a*), *post*, p. 220. But when he has not obtained possession, if the condition of the security be unfulfilled, the lien revives under clause (*b*).

Dishonour of the instrument.—As to dishonour of bills, see ss. 41 and following of the Bills of Exchange Act, 1882.

(*n*) *Goldshede v. Cottrell* (1836), 2 M. & W. 20.

(*o*) See *Robinson v. Read* (1829), 9 B. & C. 449.

(*p*) *Stedman v. Gooch* (1793), 1 Esp. 5; *Maillard v. Duke of Argyle* (1843), 6 M. & G. 40.

(*q*) *Kemp v. Watt* (1846), 15 M. & W. 672.

(*r*) *Ubi supra*.

(*s*) *Ubi supra*.

(*t*) Benj. p. 732, where all the authorities are collected on p. 733, note (*j*).

(*u*) *Cowasjee v. Thompson* (1845), 5 Moo. P. C. 165; per Cur. in *Robinson v. Read* (1829), 9 B. & C. 449.

(*v*) *Bunney v. Poyntz* (1833), 4 B. & Ad. 568; Benj. p. 736.

(*w*) Per Bayley, B., in *Miles v. Gorton* (1834), 2 C. & M. at p. 512; Benj. p. 810.

S. 38 (1) (b). **Or otherwise.**—These words seem to refer to the case of the buyer's insolvency during the currency of the bill or note.

"If the bill is dishonoured before delivery has been made, then the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser" (x).

ILLUSTRATIONS.

1. A. agrees to sell to B. a quantity of hops, and takes from him a bill of exchange at three months, which A. discounts. During the currency of the bill B. re-sells part of the hops to C., to whom A. delivers it, and before maturity B. becomes bankrupt. No tender is made to A. A. may, in spite of the part delivery to C., retain the residue as unpaid seller on B.'s bankruptcy. *Miles v. Gorton* (1834), 2 C. & M. 504.

2. A., through his agent, B., sells hay to C., and B. takes C.'s promissory note payable to B.'s order at three months. B. discounts the bill with D., and it is afterwards dishonoured. A. is not an unpaid seller, as on the receipt by his agent, B., of the amount of the note, on which A. is not liable to D. (he not having indorsed it), the condition of payment is fulfilled. *Bunney v. Poyntz* (1833), 4 B. & Ad. 568.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

S. 38 (2). **In this part of this Act.**—*I. e.*, so far as relates to the rights and remedies of an unpaid seller.

The relation of seller and buyer exists in the after-mentioned cases for the purpose only of enabling the persons specified to exercise the rights of unpaid sellers, and not generally, so as to alter the nature of the contract existing between them. Thus, a foreign consignor is a person "in the position of a seller" under this clause, and may exercise the right of stoppage *in transitu* on the insolvency of the consignee, but for other purposes, as, for example, the measure of damages, the relations existing between him and his principal is one of agent and principal, and not of seller and buyer (y).

(x) Per Mellish, L.J., in *Gunn v. Bolekow, Vaughan & Co.* (1875), 10 Ch. Ap. at p. 501.

(y) *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797, criticising and explaining the dictum of Blackburn, J., in

Any person . . . in the position of a seller.—Persons who are *quasi* sellers, i.e., in a position similar to that of a seller, have been permitted to exercise the rights of unpaid sellers. The mere possession of a lien will not, however, invest them with that character. Thus, *e.g.*, a fuller cannot stop *in transitu* (z). Most of the cases relate to the exercise of the right of stoppage *in transitu* which “has been highly favoured on account of its intrinsic justice” (a).

S. 38 (2).

Quasi sellers may exercise rights of unpaid sellers.

The clause is not meant to be exhaustive of all cases, but supplies two illustrations of the extension of the privilege: (1) *the seller's agent*, who is entitled to stop the goods *in his own name* when the bill of lading has been indorsed to him, so that he has a special property in the goods (b); and (2) a *consignor or agent* buying goods on his own credit and consigning them to his principal (c). To these may be added (3) a buyer who resells his interest under an “agreement to sell” goods, although the property in the goods has not vested in him at the time of the exercise of the right (d); and (4) a principal consigning goods to his factor, even if the latter has made advances on the faith of the consignment, or may have a joint interest with the principal (e).

Examples of such.

A surety for the buyer is not, it seems, able to exercise the right of stoppage *in transitu* in his own name (f), but he may, under s. 5 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), on payment of the price, exercise the rights of the unpaid seller in the latter's name (g).

Do not include a surety for buyer.

ILLUSTRATIONS.

1. A. sells and ships goods to B. B. becomes insolvent, and A. indorses and forwards the bill of lading to C., his agent. C. may exercise the right of stoppage *in transitu* in his own name. *Morison v. Gray* (1824), 2 Bing. 260.

2. B. orders A., a foreign commission agent, to buy and consign to

Ireland v. Livingston (1872), 5 H. L. at p. 409.

(z) *Sweet v. Pym* (1800), 1 East, 4; Benj. p. 847.

(a) Benj. p. 844.

(b) *Morison v. Gray* (1824), 2 Bing. 260; and see Bills of Lading Act, s. 1, Appendix of Statutes, *post*, p. 322, and s. 19 (2) of this Act, *ante*, p. 136.

(c) *Feiss v. Wray* (1802), 3 East, 93; *Hawkes v. Dunn* (1831), 1 Tyrwh. 413; and cases collected in Benj.

p. 844, note (d).

(d) *Jenkyns v. Usborne* (1844), 7 M. & G. 678.

(e) *Kinloch v. Craig* (1790), 3 T. R. 119, 783; *Newsom v. Thornton* (1805), 6 East, 17; Benj. p. 847.

(f) *Siffken v. Wray* (1805), 6 East, 371.

(g) *Imperial Bank v. The London and St. Katharine Dock Co.* (1877), 5 Ch. D. 195; note that this was a case of seller's lien, and not of stoppage *in transitu*.

S. 38 (2).

him a quantity of wax. A. buys the wax on his own credit and ships it in B.'s name. B. becomes insolvent during the transit. A. may stop the goods. *Feise v. Wray* (1802), 3 East, 93.

3. B. agrees to buy of A. a number of sacks of beans forming part of a cargo. Before the arrival of the ship B. resells the beans on credit to C. C. becomes insolvent before paying for the goods. B. can stop the goods *in transitu*, though his interest in them was not at the time a right of property. *Jenkyns v. Usborne* (1844), 7 M. & G. 678.

4. B., a broker, buys goods of A. for C., an undisclosed principal, and thereby by trade custom becomes liable to A., on C.'s default, for the price of the goods. C. stops payment. B., having paid A., is entitled, as C.'s surety, to exercise A.'s lien as unpaid seller. *Imperial Bank v. London and St. Kath. Dock Co.* (1877), 5 Ch. D. 195.

Unpaid
seller's rights.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) A lien on the goods or right to retain them for the price while he is in possession of them;
- (b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;
- (c) A right of re-sale as limited by this Act.

S. 39 (1).

Subject to the provisions of this Act.—See ss. 41—47, *post*. For the effect on the lien, &c., of a re-sale or pledge by the buyer, see s. 25 (2).

Any statute in that behalf.—See the Bills of Lading Act (18 & 19 Vict. c. 11), and the Factors Act, 1889, ss. 8—10, which are *in pari materia*. (See Appendix of Statutes, *post*.)

Notwithstanding that the property in the goods may have passed.—As to the time when the property passes, see ss. 16—19, *ante*.

By English law, which herein differs from the civil law, a sale of specific goods, usually called a “bargain and sale,” and now under s. 62 (1) included in the term “sale,” transfers the property in the goods to the buyer without delivery. The buyer, having the legal property in the goods, is *primâ facie* entitled to the possession of them. But his right to possession is only a *primâ facie* one, because the law presumes that, in the absence of a contrary intention, the seller does not intend to part with the possession of the goods until the buyer has paid the price—this is the

unpaid seller's right of lien under clause (a); and further, when the seller has parted with the possession, the law allows him, upon the buyer's insolvency, to retake possession, and restores him to his original position—this is the unpaid seller's right of stoppage *in transitu* under clause (b). The property in the goods, therefore, passes to the buyer subject to these rights of the unpaid seller. Both rights over the goods sold seem to owe their origin to the custom of merchants, and were afterwards engrafted thence on the common law (h).

S. 39 (1).

The unpaid seller.—Defined in the previous section.

By implication of law.—The rights of the unpaid seller arise, not from the agreement of the parties, but from the presumption of law as to the intention of the parties in the absence of express agreement. This presumption may, of course, be rebutted under s. 55, or the seller may be estopped from exercising his rights under s. 47.

Lord Blackburn shows that, applying the ordinary rule of construction applicable to contracts, the seller's rights would be far more limited than those the law implies. "The unpaid seller has rights of a peculiar nature, which are conferred by the law, though they are not such as, on the ordinary rules of construction, would be impliedly reserved by the contract, and though one of them at least (stoppage *in transitu*) is of a nature that could scarcely be created by the agreement of the parties" (i).

A lien . . . for the price.—The nature and extent of the unpaid seller's rights over the goods while remaining in his possession have never been precisely defined at common law. It seems clear from the decided cases that his rights were regarded as exceeding a lien, or mere personal right of retaining possession of the goods, which would not enable him to re-sell and confer a good title upon a second purchaser. It is also equally clear that his rights did not amount to the right to resume his original ownership, or, in other words, to rescind the contract of sale (j). Lord Blackburn, who fully discusses the question (k), says:—"The precise extent of the vendor's right between those limits

S. 39 (1) (a)

(h) Blackb. p. 453; per Lord Abinger in *Gibson v. Carruthers* (1841), 8 M. & W. at p. 337; and per Bowen, L.J., in *Kendal v. Marshall* (1883), 11 Q. B. D. at p. 368. The seller's lien is first recognized in a case in the Year Book (17 Ed. 4, fo. 1, 2), anno 1478;

and the right of stoppage *in transitu* in *Wiseman v. Vandepuut*, 2 Vern. 202, in Chancery temp. 1690.

(i) Blackb. p. 447.

(j) See s. 48 (1), *post*, and notes thereto.

(k) Treatise on Sale, pp. 445 *et seq.*

S. 39 (1) (a). is very much a matter of conjecture. It would seem that, viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of re-sale to be exercised in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances" (*l*). By this section of the Act these rights of the seller *in possession* are expressly defined to be (1) a lien (*m*) [sub-s. 1 (a)], and (2) a right of re-sale, as limited by the Act [sub-s. 1 (c)], *i. e.*, subject to the provisions of s. 48 (3), *post*. The clause, in effect, embodies the doctrine stated by Lord Blackburn in the above-cited passage, as being one which does little violence to the decided cases, but which is not laid down in any of them.

The leading case on the subject is *Bloxam v. Sanders* (*n*). The law was stated by Bayley, J., in these terms with regard to clause (a):—"The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part; and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the buyer is immediately entitled to the possession, and the right of possession and the right of property vest at once in him (*o*); but his right of possession is not absolute—it is liable to be defeated if he becomes insolvent before he obtains possession" (*p*).

The learned judge further goes on to state the law under clause (b):—"If the seller have despatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them *in transitu* (*q*). Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender

(*l*) p. 446.

(*m*) The additional words, "or right to retain," were inserted when the Act was extended to Scotland, though by s. 62 "lien" in Scotland includes "right of retention." As to the

"right of retention" in Scotch law, see Benj. p. 384.

(*n*) (1825), 4 B. & C. 941.

(*o*) See s. 41 (1) (a).

(*p*) See s. 41 (1) (c).

(*q*) See s. 44.

the price (*r*), or they may still act on their right of property if anything unwarrantable is done to that right.” S. 39 (1) (a).

The distinction between the seller's lien and his right of stoppage *in transitu* may be stated shortly as follows:—Lien is the right to *retain* possession of goods sold until payment of the price. It attaches either when the buyer is solvent, but in default, or when the buyer is insolvent, and whether he be in default or not. Stoppage *in transitu* is the right to *retake* possession of goods which have left the seller's possession, but have not yet reached the possession of the buyer. It only arises on the buyer's insolvency. When the right of stoppage *in transitu* arises, the lien has been lost; when the right of stoppage *in transitu* has been exercised, the lien is restored; the effect of the stoppage being to replace the seller in the position in which he stood before he parted with the possession, and entitle him to retain the goods until payment of the price (*s*). Lien and stoppage *in transitu* distinguished.

As to the different effect produced by the transfer of a bill of lading upon the seller's lien, and his right of stoppage *in transitu* respectively, see *post*, p. 260.

“A lien in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied; and as the rule of law is that, in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right to retain the goods until payment of the price, he has in all cases *at least* a lien, unless he has waived it” (*t*).

“But this lien extends only to *the price*. If by reason of the vendor's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the seller's remedy, *if any*, is personal against the buyer” (*u*). This personal right of the seller is now given by s. 37, *ante*, p. 208.

Lien is considered in ss. 41, 42, 47; its duration in s. 43; and its effect on the contract in s. 48 (1).

While he is in possession.—As to possession, see notes to s. 41 (2), *post*, p. 222; and the analogous case of an engineer's lien on a possession *prima facie* not absolutely exclusive, *Ex parte Willoughby* (*v*).

(*r*) S. 44.

(*s*) See *per Parke, B.*, in *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

(*t*) Benj. p. 807, citing *Hammonds v. Barclay* (1802), 2 East, 227; *Miles*

v. Gorton (1834), 2 C. & M. 504.

(*u*) Benj. p. 807, quoting *Somes v. British Empire Shipping Co.* (1858), E. B. & E. 353 (in Ex. Ch.) *ibid.* 367; (in H. of L.) 8 H. & C. 338.

(*v*) (1881), 16 Ch. D. 604.

S. 39 (1) (b). **A right of stopping the goods in transitu.**—Stoppage in transitu is defined and considered in ss. 44—48, *post*.

In case of the insolvency of the buyer.—As to insolvency, see s. 62 (3), and notes to s. 44, *post*, p. 235.

S. 39 (1) (c). **A right of re-sale.**—Re-sale is treated in s. 48.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

S. 39 (2). Lien and stoppage *in transitu* presuppose that the property in the goods has passed to the buyer—that there has been a sale of the goods. Under an “agreement to sell,” or an executory contract of sale where the property has not passed to the buyer, the seller is entitled to exercise an analogous right of withholding delivery (*w*). This clause is merely declaratory of the previous law (*x*).

It is well-settled law that under an agreement to sell, when the goods are to be delivered by *instalments*, the seller may, on the buyer's *insolvency*, and although he may have given credit, withhold delivery, or further delivery, until the price of *all* the goods unpaid for is tendered to him (*y*). The seller has the further right of repudiating the contract if the buyer, or his trustee in bankruptcy, does not, within a reasonable time, tender the price of the goods in cash (*z*). See notes to s. 31 (2), *ante*, p. 197. In all the cases cited in the notes, *infra*, the buyer had become insolvent; but it is clear that, according to the wording of this sub-section, the seller may exercise the right of withholding delivery where the buyer is solvent, but in default.

In addition to his other remedies.—*I.e.*, an action for damages for non-acceptance under s. 50; and, where the payment of the price is by agreement independent of the passing of the property, an action for the price under s. 49 (2).

(*w*) Cf. the “right of retention” in Scotland, as stated in Benj. p. 384.

(*x*) See *Griffiths v. Perry* (1859), E. & E. 680; 28 L. J. Q. B. 204; *Ex parte Chalmers* (1873), 8 Ch. Ap. 289; Benj. p. 772.

(*y*) *Valpy v. Oakley* (1851), 16 Q.

B. 941; 20 L. J. Q. B. 380; *Griffiths v. Perry*, *supra*; 28 L. J. Q. B. 204; *Ex parte Chalmers*, *supra*; *Bellamy v. Davey*, [1891] 3 Ch. 540.

(*z*) *Ex parte Chalmers*, *supra*; *Morgan v. Bain* (1874), L. R. 10 C. P. 15; *Ex parte Stapleton* (1879), 10 Ch. D. 586.

ILLUSTRATION.

A. agrees to sell to B. 330 tons of bleaching powder, deliverable 30 tons a month for eleven months, payment to be by cash fourteen days after each delivery. The deliveries for ten months are made, and nine of them paid for. A. may withhold delivery of the last instalment until the price of that and the previous delivery is tendered to him, A. being to that extent an unpaid seller. *Ex parte Chalmers* (1873), 8 Ch. Ap. 289.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Attachment
by seller in
Scotland.

This section reproduces s. 3 of 19 & 20 Vict. c. 60, the Mercantile Law Amendment (Scotland) Act (a), which is repealed by this Act (b).

As to the nature of "arrestment" and "poinding," see 2 Bell's Comm., 7th ed., pp. 54 *et seq.*

Unpaid Seller's Lien.

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

Seller's lien.

- (a) Where the goods have been sold without any stipulation as to credit;
- (b) Where the goods have been sold on credit, but the term of credit has expired;
- (c) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Subject to the provisions of this Act.—*I. e.*, s. 39, *ante*; s. 42, S. 41 (1).

(a) See *Wyper v. Harveys* (1861), 23 C. of S. Cas. 606.

(b) See Schedule of repealed enactments at the end of the Act.

S. 41 (1). *post* (lien after part delivery), and s. 55, *post* (effect of express agreement, course of dealing or usage).

The unpaid seller.—Defined in s. 38, *ante*, p. 209.

In possession.—As to what constitutes “possession,” see notes to sub-s. 2, *post*, p. 222.

Payment or tender.—See notes to s. 38, *ante*, p. 210. The seller’s lien being granted to him for the purpose only of securing payment of the price, it is necessarily lost by tender thereof, even if the seller decline to receive the money (*d*).

Entitled to retain possession.—The cases specified in s. 41 (1) are all referred to in the following passage from Mr. Benjamin’s work:—“When the goods have not yet left the actual possession of the seller, he has at common law *at least* a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods [sub-s. (1) (a)]. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien (*e*); and if the buyer then exercises his rights, and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose, that after a bargain in which the lien has thus been unequivocally waived, the buyer, for his convenience, or any other motive, has left the goods in the custody of the seller until the credit has expired [sub-s. (1) (b)], and has then made default in payment or has become insolvent [sub-s. (1) (c)] before the credit has expired, What are the seller’s rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive on the ground that the waiver was conditional on the buyer’s maintaining himself in good credit? Or can the seller exercise a *quasi* right of stoppage *in transitu*—a right that might, perhaps, be termed a stoppage *ante-transitum*?” (*f*). The propositions contained in sub-s. (1) (b) and (c), *supra*, which are declaratory of the earlier law, and based upon the authorities cited in the notes (*g*), (*h*), *infra*, supply the answer to the question raised by Mr. Benjamin. During the currency of the credit, the seller cannot exercise his lien, except in the case of the buyer’s insolvency (*g*), but on the expiration of the term of

S. 41 (1) (a).

S. 41 (1) (b).

(*d*) *Martindale v. Smith* (1841), 1 p. 232.

Q. B. 389.

(*f*) *Benj.* p. 767.

(*e*) See *Spartali v. Benecke* (1850),
10 C. B. 212, and s. 43 (1) (c), *post*,

(*g*) Per Bayley, B., in *Miles v. Gorton* (1834), 2 C. & M. at p. 512.

credit his lien revives, although the buyer may not then be insolvent (*h*). The seller's right under these circumstances is, perhaps, not strictly a lien, but a right to withhold delivery analogous to that of stoppage *in transitu* (*i*). S. 41 (1) (b).

The parties may, of course, under s. 55, expressly agree that the goods, although sold on credit, are not to be delivered until paid for, and evidence of a trade usage to the same effect is admissible (*j*).

Where the buyer becomes insolvent.—For “insolvency,” see the definition in s. 62 (3), and notes. The right of the seller to retain the goods on the buyer's insolvency is independent of his right to retain under the previous two clauses. Thus upon the buyer's insolvency before obtaining possession of the goods, the seller can exercise his lien (*k*), and when the sale is on credit, his lien revives, whether the buyer's insolvency occur before or after the expiration of the term of credit (*l*). Under s. 39 (2), the right exists as well in the case of an executory contract or “agreement to sell” as of a sale of specific goods. S. 41 (1) (c).

The effect of the buyer's insolvency not being to rescind the contract (*m*), the seller cannot refuse to deliver the goods to the buyer's trustee in bankruptcy, if the latter tender the price in cash within a reasonable time (*n*); and it seems that a sub-buyer from the insolvent buyer is entitled to complete the contract upon the same terms (*o*). It has, however, been shown in the notes to s. 31 (2), *ante*, p. 197, that a notice of the buyer's insolvency may be treated by the seller as an offer to rescind the contract.

The seller may exercise his . . . lien, notwithstanding, &c.— S. 41 (2).

(*h*) Directly decided at *Nisi Prius*, per Bayley, J., in *New v. Swain* (1828), *Dans. & L.* 193; and per Littledale, J., in *Bunney v. Poyntz* (1833), 4 B. & Ad. 568; and see per Cur. in *Martindale v. Smith* (1841), 1 Q. B. at p. 395; per Martin and Channell, BB., in *Castle v. Swoorder* (1860), 5 H. & N. 281; and per Cur. in *Valpy v. Oakeley* (1851) 16 Q. B. 941, 951.

(*i*) Of. the right of retention in Scotch law.

(*j*) See *Field v. Lelean* (1861), 6 H. & N. 617; 30 L. J. Ex. 168.

(*k*) *Bloxam v. Sanders* (1825), 4 B. & C. 941 (the leading case).

(*l*) *Grice v. Richardson* (1877), 3

Ap. Ca. 319; per Parke, J., in *Dixon v. Yates* (1833), 5 B. & Ad. at p. 341.

(*m*) *Boorman v. Nash* (1829), 9 B. & C. 145.

(*n*) Per Cur. in *Ex parte Chalmers*, (1873), 8 Ch. App. 289; followed in *re Phoenix Bessemer Steel Co.* (1876), 4 Ch. D. 108; *Bloomer v. Bernstein* (1874), L. R. 9 C. P. 588; per Cur. in *Morgan v. Bain* (1874), L. R. 10 C. P. 15; *Ex parte Stapleton* (1879), 10 Ch. D. 586.

(*o*) Per Cur. in *Ex parte Stapleton*, *supra*, at p. 590. As to the trustee's right to disclaim the onerous contracts of an insolvent buyer, see s. 55 of the Bankruptcy Act, 1883.

S. 41 (2).

This sub-section extends the previous law as laid down in *Townley v. Crump* (n), and *Grice v. Richardson* (o), in which cases the buyer was *insolvent*. It was previously doubtful whether the seller retained his rights after an attornment where the buyer was only in default, and the sub-section, as originally drafted, limited the statement of the law to the case of insolvency only, according to the opinion of Blackburn, J. (p). The sub-section is now extended to include all cases.

He is in possession . . . as agent or bailee . . . for the buyer.—The Act does not define possession. The seller is in possession of goods for the purpose of exercising his lien when the goods are either in his actual custody, or are held by any other person subject to his control or on his behalf. (See the definition of possession given in s. 1 (2) of the Factors Act, Appendix of Statutes, *post*, p. 325.) It follows from this definition that when the seller is also a warehouseman, attornment by the seller to the buyer does not divest the seller's lien because the goods remain in the seller's actual custody. On the other hand, when the goods are in the possession of a third person as bailee, attornment by that third person to the buyer divests the seller's lien, because the third person ceases to hold the goods subject to the seller's control or on his behalf (q). It is important to note that the test of "actual receipt" by the buyer does not apply here. If the seller attorns to the buyer, *i. e.*, consents to assume the changed character of bailee for the buyer, this constitutes an "actual receipt" of the goods by the buyer under s. 4, although it has not the effect of divesting the seller's lien. It thus forms an exception to the general rule, stated *ante*, p. 39, that in most cases the test for determining whether there has been an actual receipt is to inquire whether the seller has lost his lien (r).

ILLUSTRATION.

A. a warehouseman, as well as an importer of tea, sells to B. chests of tea then in A.'s warehouse, and hands him a delivery order which states that the tea remains at rent on B.'s behalf, and makes it transferable on B.'s indorsement, and an entry of the transfer is made in A.'s books. B. gives an acceptance for the price. B. becomes insolvent and the bill is dishonoured. A.'s lien revives. *Grice v. Richardson* (1877), 3 Ap. Ca. 319.

(n) (1836), 4 A. & E. 58.

Blackb. p. 335.

(o) (1877), 3 Ap. Ca. 319, following *Miles v. Gorton* (1834), 2 C. & M. 504.

(q) Per Bayley, J. (*arguendo*), in *Miles v. Gorton* (1834), 2 C. & M. at p. 510.

(p) In *Cusack v. Robinson* (1861), 30 L. J. Q. B. at p. 264; and see

(r) On this point, see Benj. pp. 768, 771, 811.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

S. 42.

Part delivery.

"Generally, a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the seller's lien. He may, if he choose, give up part and retain the rest; and then his lien will remain on the part retained in his possession for the price of the whole; but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole and puts an end to the seller's possession, and, consequently, to his lien" (s).

And with regard to the intention governing part delivery, Lord Blackburn says, in *Kemp v. Falk* (t), "It may very well be that the delivery of part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole."

And the burden of proof seems to lie on the party who contends for a complete delivery (u).

An agreement to waive the lien.—The agreement to waive the lien (see s. 55, *post*) may be inferred from the circumstances in which the part delivery takes place; e.g., the buyer may express his intention, or may be in a position, to take the whole of the goods, although he actually take only a part (x); or the person taking delivery may do so in such a character,—e.g., as assignee in bankruptcy of the buyer,—as to show an intention to take constructive possession of all (y); or, possibly, such an intention may be inferred when the thing sold consists of several parts, and there is a delivery of an essential part of it (z). On the other hand, an intention to separate the part actually taken may

(s) Benj. p. 813.

(t) (1882), L. R. 7 Ap. Ca. at p. 586.

(u) *Ibid*.(x) *Hammond v. Anderson* (1803), 1 B. & P. N. R. 69.(y) *Jones v. Jones* (1841), 8 M. & W. 431, explained in *Ex parte Cooper* (1879), 11 Ch. D. at p. 77.(z) The case suggested by Cotton, L.J., in *Ex parte Cooper*, *ibid.* at p. 76.

S. 42. be inferred, as, *e.g.*, where the delivery is to fulfil a particular sub-contract for a less quantity than the whole (a).

The following points are noticeable :—

(1.) When the goods are *in the seller's possession*. It seems that a part delivery under these circumstances has never been held equivalent to a delivery of the whole of the goods (b).

(2.) When the goods are *in the possession of a third party*.

(a) *As warehouseman*.—The part delivery is evidence of attornment by the seller's agent to the buyer, and the seller's lien is lost by reason not of the part delivery, but of the loss of possession on the bailee's change of character (c).

(b) *As shipper or carrier*.—The fact that freight or charges remain unpaid, raises a strong presumption that the shipper or carrier intends to retain his lien for the freight, and part delivery of the goods will not constitute delivery of the whole (d).

When the goods are in course of transit, a part delivery has the same effect under s. 45 (7) for the purpose of divesting the seller's right of stoppage as it has of divesting the lien of the seller in possession.

Retention . . . right of retention.—These are terms of Scotch law: see s. 39 (1) (a), p. 216.

ILLUSTRATIONS (e).

1. A. sells to B. some hay then lying on A.'s premises. B., with A.'s permission, cuts and takes away part of the hay, but is not allowed by

(a) *Tanner v. Scovell* (1845), 14 M. & W. 28.

(b) See per Lord Ellenborough in *Payne v. Shadbolt* (1808), 1 Camp. 427, and Benj. p. 817.

(c) *Slubey v. Heyward* (1795), 2 H. Bl. 504; and *Hammond v. Anderson* (1803), 1 B. & P. N. R. 69; so explained by Brett, L.J., in *Ex parte Cooper* (1879), 11 Ch. D. at p. 74, and by Bramwell, L.J., in *Ex parte Falk* (1880), 14 Ch. D. at p. 455; Pollock on Possession, pp. 70 *et seq.*

(d) *Ex parte Cooper*, *supra*; *Crawshay v. Eades* (1823), 1 B. & C. 181. The following are the authorities on the subject of part delivery in order of date: *Slubey v. Heyward* (1795), 2 H. Bl. 504; *Hammond v. Anderson* (1803), 1 B. & P. N. R. 69;

Simmons v. Swift (1826), 5 B. & C. 857; *Bunnay v. Poyntz* (1833), 4 B. & Ad. 568; *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Miles v. Gorton* (1834), 2 C. & M. 504; *Betts v. Gibbins* (1834), 2 A. & E. 57; *Jones v. Jones* (1841), 8 M. & W. 431; *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; *Tanner v. Scovell* (1845), 14 M. & W. 28; *Ex parte Gibbes* (1875), 1 Ch. D. 101; *Ex parte Cooper* (1879), 11 Ch. D. 68 (criticism of *Slubey v. Heyward*, *Hammond v. Anderson*, and *Jones v. Jones*, *supra*, per Brett and Cotton, L.J.J., at pp. 74, 77); *Kemp v. Falk* (1882), 7 Ap. Ca., per Lord Blackburn, at p. 586.

(e) See also the Illustrations to s. 45 (7), *post*, p. 251.

A. to cut the remainder. A. may exercise his lien over the rest of the hay. *Bunney v. Poyntz* (1833), 4 B. & A. 568.

S. 42.

2. A. sells to B. goods then lying at the wharf of C. C. afterwards delivers a small portion of the goods to D., a sub-buyer from B., but the goods are not transferred into B.'s name, nor does B. pay rent therefor. This part delivery is not a constructive delivery of the whole of the goods, as B. only intended to take delivery of so much as would satisfy his contract with D., and the facts also show that C. did not, by the part delivery, intend to attorn generally to B. *Tanner v. Scovell* (1845), 14 M. & W. 28.

3. A. sells to B. forty-six puncheons of rum lying in C.'s warehouse. On B.'s request for a delivery order, A. gives B. delivery orders for two puncheons only, which are then delivered to a purchaser from B. A. can exercise his lien over the remaining forty-four puncheons. *Dixon v. Yates* (1833), 5 B. & Ad. 313.

4. A. sells to B., for 798*l.*, payable by bill, a quantity of bacon then lying at C.'s wharf, and leaves an order with C. to deliver to B. B. weighs the whole of the bacon, and takes away twenty-five bales. B. then becomes bankrupt. The part delivery to B. divests A.'s lien, as it appears from the facts—viz., B. having taken possession of the whole of the bacon for the purpose of weighing, the price being entire, and C.'s assenting to B.'s acts—that C. had consented to become bailee of all the bacon. *Hammond v. Anderson* (1803), 1 B. & P. N. R. 69 (*f*).

43.—(1.) The unpaid seller of goods loses his lien Termination
of lien. or right of retention thereon—

- (a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) When the buyer or his agent lawfully obtains possession of the goods;
- (c) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

When he delivers the goods to a carrier, &c.—“A delivery of the goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer, through his agent, the carrier, as suffices to put an end to the seller's lien” (*g*). The case is therefore only an illustration of the S. 43 (1) (a).

(*f*) As explained in *Ex parte Cooper* at p. 571.

and *Ex parte Falk*, note (*d*) on preceding page; and per Parke, J., in *Bunney v. Poyntz* (1833), 4 B. & Ad. (*g*) Benj. p. 813, and the authorities cited in the note *in loc*.

S. 43 (1) (a). following clause, sub-s. (1) (b). The law relating to delivery to a carrier has been already stated in s. 32, *ante*, p. 198.

Seller does not lose lien when carrier is his agent.

By the term "carrier," though spoken of in general terms, is doubtless meant, as before the Act, a carrier, being the *buyer's* agent. If he be the seller's agent, the seller, having possession, would naturally not lose his lien. In such a case the seller would seem to "reserve the right of disposal" under this clause. On this Lord Blackburn makes the following remarks:—

"It is very usual for a vendor to reserve to himself by the terms of the contract of sale, and of the contract which he makes with the carrier, a right to prevent or delay the delivery of the goods to the purchaser until some conditions are fulfilled. When this is the case the solvency of the purchaser is beside the question; neither he nor his representatives have any right to take possession until the conditions are fulfilled, or are waived by the vendor. . . . When the conditions are binding, the case is not one of stoppage *in transitu*, but rather a case in which the particular circumstances have prevented the *transitus* ever commencing, as the carrier, instead of being an agent to forward from the vendor to the buyer, has agreed to be an agent to keep possession for the vendor until the conditions are fulfilled" (i). See further, the notes below on the effect of these words.

The lien, when lost by delivery to a carrier, may, of course, be reverted under s. 44 by stoppage *in transitu*.

Or other bailee.—As the "other bailee" must be one "for the purpose of transmission to the buyer," the term must have been intended, *ex majori cautela*, to be synonymous with "carrier," or to include cases where the carrier temporarily warehouses the goods in the course of transit. The case of a warehouseman or wharfinger to hold possession apart from transit is dealt with in the following clause (b).

Custodier.—This is a Scotch term, and is also included under the term "bailee" by s. 62 (1), *post*.

Effect of shipment upon the seller's lien.

Without reserving the right of disposal.—When goods are carried by sea, the effect upon the seller's lien, of delivery of the goods on board ship, depends upon the seller's intention at the time of shipment to transfer to the buyer the possession of the goods. The seller may intend to reserve his right of disposal of the goods, and may effectuate that intention by taking the bill of lading to his own order or assigns under s. 19 (2), and so restrict the effect of delivery. Shipment, when a bill of lading

is taken, is not a delivery to the buyer, but to the master of the ship, as bailee, to deliver to the person indicated in the bill of lading (k). It follows that delivery on board the buyer's own ship, whether it be a general ship, or one sent specially for the goods, when the seller does not restrict the delivery by the form of the bill of lading, or otherwise, is a delivery to the master of the ship, not as carrier, but as the buyer's agent (l), and the seller's lien is lost under sub-s. (1) (b), next following. The shipment is not complete until the bill of lading has been taken (m), and, prior thereto, the shipper's intention as to the effect of the delivery may be inferred from the terms of the ship's receipt for the goods (n). When the seller takes a bill of lading making the goods deliverable to his own order, or assigns, that is *prima facie* evidence that he intends to retain control over the goods, and his lien will not be lost. (See s. 19 (2).) But when the goods have been shipped, and the seller has taken a bill of lading to the order of the buyer, or has duly indorsed the bill of lading to him, then the shipment is equivalent to delivery of possession of the goods and the seller's lien is gone. "A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During the period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operate as a symbolical delivery of the cargo" (o). Generally, as to the seller's reservation of the *jus disponendi*, or "right of disposal" of the goods, see s. 19, *ante*, p. 136, and Benj. pp. 345—371. S. 43 (1) (a).

ILLUSTRATIONS.

1. A. agrees to sell goods to B. free on board a ship, and delivers them on board and takes a receipt in his own name, being thereby entitled to demand the bill of lading. A. has not lost his lien, as he has reserved the right of disposal of the goods. *Craven v. Ryder* (1816), 6 Taunt. 433 (p).

(k) Per Parke, B., in *Wait v. Baker* (1848), 2 Ex. 1.

(l) *Turner v. Trustees of the Liverpool Docks* (1851), 6 Ex. 543; 20 L. J. Ex. 394; *Schotmans v. Lancashire & Yorkshire Ry. Co.* (1867), 2 Ch. Ap. 332; and see s. 45 (1), p. 239, as to the effect of such a delivery on the seller's right of stoppage *in transitu*.

(m) Per Bramwell, B., in *Gabarron v. Kreeft* (1875), L. R. 10 Ex. at p. 281.

(n) *Craven v. Ryder* (1816), 6 Taunt. 433; *Falk v. Fletcher* (1865), 18 C. B. N. S. 400.

(o) Per Bowen, L.J., in *Sanders v. Maclean* (1883), 11 Q. B. D. at p. 341.

(p) See also *Ruck v. Hatfield* (1822), 5 B. & A. 632, where the seller demanded a receipt which was not given. *Aliter*, if the ship belongs to the buyer: *Cowasjee v. Thompson* (1845), 5 Moo. P. C. 165.

S. 43 (1) (a). 2. A. sells goods to B., and delivers them on board B.'s general ship, and takes the bill of lading to the order of B. This is a delivery (without a reservation of the right of disposal) by A. to the master of the ship as carrier or agent for B., and A. has lost his lien. *Schotemans v. L. & Y. Ry. Co.* (1867), 2 Ch. Ap. 332.

S. 43 (1) (b). **When the buyer or his agent lawfully obtains possession.**—The possession must be obtained *lawfully*. It is apparently otherwise in the case of stoppage *in transitu* (see notes to s. 45 (2), *post*, p. 245).

(1) Abandonment of lien. The seller may lose his lien (1) by abandonment, or (2) by waiver. He abandons his lien by parting with the possession of the goods to the buyer or his agent; he waives his lien when, without parting with possession, he shows his intention at the time of the formation of the contract not to retain possession until payment of the price. The seller's waiver of his lien is discussed under clause (c), *post*, p. 232.

It will be found convenient, in treating of the different modes by which the seller may abandon his lien, to classify them with regard to the situation of the goods at the time of the contract.

(i) Goods in seller's possession.

(i) *Goods in the seller's possession.*—This is the ordinary case, and the modes by which delivery of possession may be effected are so various as to justify the remark that "it is difficult to select those leading principles which are sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law" (q). The simplest mode is for the buyer to send his own cart, barge or ship for the goods, and either himself or by his agent to remove the goods out of the seller's possession by receiving them in the cart, barge or ship (r). Another mode is for the seller to deliver the goods to a carrier for transmission to the buyer under sub-s. 1 (a), *supra*. Apart from these obvious modes, possession of goods may be delivered in various ways according to circumstances. Speaking generally, the same acts which amount to an "actual receipt" of the goods within the meaning of s. 4 will constitute a delivery of possession to divest the seller's lien (s), so that the inquiry on this point has been anticipated (*ante*, pp. 36—40). But there is one exception in the case where the seller in possession agrees to retain possession of the goods as bailee for the buyer. This change in the character of the possession constitutes an "actual receipt" by

(q) 2 Kent's Comm. 510 (ed. 1873), cited in Benj. 813.

(r) See, however, on this the remarks of Jessel, M.R., in *Merchant*

Banking Co. v. Phoenix Bessemer Steel Co. (1877), 5 Ch. D. at p. 219.

(s) Per Cur., in *Cusack v. Robinson* (1861), 1 B. & S. 299.

the buyer under s. 4, but is not a delivery of possession effectual to divest the seller's lien (*t*). S. 43 (1) (b).

Conversely, the buyer may take possession as bailee for the seller, and it has been held that the seller's rights are not determined (*u*). Buyer obtaining possession as seller's bailee, and effect of this clause thereon.

In spite of the generality of the terms employed, there is, it is submitted, no change of the law effected with regard to this latter class of cases. When the buyer obtains actual possession of the goods, as the seller's bailee for a special purpose, the transaction may be looked at in several ways: (1) that the buyer's possession is not such a possession as is contemplated by clause (b). This appears to be the view of Lord Blackburn (*v*) and Mr. Campbell (*w*), the latter of whom states broadly his opinion that there is no transfer of possession at all, on the authority of *Tempest v. Fitzgerald*, and *Reeves v. Capper, infra* (*u*); and Lord Blackburn says, with regard to the former case, that the buyer there *had no right* to take away the horse. Perhaps the word "lawfully" was inserted in the clause to include such a case. (2) That the agreement constituting the bailment may be an agreement under s. 55 negating the seller's liability to lose his lien; and (3) that by the agreement the seller may have reserved to him, not a lien properly so called, but such a special interest or property as is referred to in *Dodsley v. Varley* (*x*), i. e., "independent of actual possession, and consistent with the [general] property being in the buyer." In the latter case the seller's interest would not be dealt with by this clause at all, but would be preserved as a common law rule by s. 61 (2).

Under very similar circumstances the co-owner of a box, who was by agreement entitled to the possession of it, was held by that agreement to have a special property in the other co-owner's half of the box, independent of the latter's temporary possession as special bailee (*y*).

A delivery of possession is not effected by the "mere marking of the goods in the buyer's name, or setting them aside, or boxing them up by the buyer's orders, and putting his name on them, so long as the seller holds the goods, and has not agreed to give credit for them" (*z*); but it is otherwise when Possession not changed by marking or packing goods.

(*t*) See notes to s. 41 (2), *ante*, p. 222. *Townley v. Crump* (1836), 4 A. & E. 58; and cf. *Elmore v. Stone* (1809), 1 Taunt. 458; Benj. pp. 771, 812.

(*u*) *Reeves v. Capper* (1838), 5 B. N. C. 136; *Tempest v. Fitzgerald* (1820), 3 B. & A. 680.

(*v*) Blackb. p. 30.

(*w*) On Sale (1st ed.), p. 346.

(*x*) (1840), 12 A. & E. 632, 634.

(*y*) See *Nyburg v. Handelslaar*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709, the latter being the better report.

(*z*) Benj. p. 817.

s. 43 (1) (b). the goods are in the possession of a third person not being bailee for the seller (a). (See *post*, p. 231.)

(ii) Goods in buyer's possession as seller's bailee.

(ii) *Goods in the buyer's possession as the seller's bailee.*—In this case, which is not a common one, there is no change of possession required, but only a change in the character of the possession, and this is effected by the completion of the contract of sale without any further act of the parties. "After a sale has been *shown to exist*, the goods being already in *actual* possession, and the effect of the contract being to transfer the *right of possession* as well as that of property, the delivery becomes complete of necessity without further act on either side, though of course in this, as in all other cases, the parties may by agreement [under s. 55] provide that this effect shall not take place. If A. has consigned to B. goods for sale, there is nothing in the law to prevent a contract between them by which A. sells the goods to B., coupled with a stipulation that B.'s possession shall continue to be that of a bailee for A. until payment of the price" (b).

Mr. Benjamin, however, shows (c) that "if the question were as to the *formation* of the contract [under s. 4], evidence would of course be required to show that the buyer's possession had become changed from that of bailee to that of purchaser" (d). By this the learned author appears to mean that in these cases some *act* of the buyer is required inconsistent with the continuance of his former possession, and thus *authenticating* the contract.

(iii) Goods in possession of third person, (a) being the seller's agent.

(iii) *Goods in the possession of a third person.*

(a) When the third person is the seller's agent.

An actual delivery of possession takes place, and the seller's lien is lost, when the agent *attorns* to the buyer, that is to say, when he agrees, with the assent of both parties, to retain possession of the goods as the buyer's agent (e). When the goods are lying in a warehouse or on a wharf, the mere transfer of a delivery order, dock warrant, or other so-called "document of title" does not (apart from statute) divest the seller's lien until the document has been lodged with the warehouseman, wharfinger, or other custodian of the goods and has been accepted by him (f). Herein the transfer of these documents

(a) Benj. p. 840.

(b) Benj. p. 812; Pollock on Possession, p. 74.

(c) p. 812.

(d) *Edan v. Dudgefield* (1841), 1 Q. B. 302; *Lillywhite v. Devereux* (1846), 15 M. & W. 285; *Taylor v. Wakefield* (1856), 6 E. & B. 765.

(e) Benj. pp. 159 *et seq.*, 778 *et seq.*, 812.

(f) *Bentall v. Burn* (1824), 3 B. & C. 423; *McEwan v. Smith* (1849), 2 H. L. 309. *Quære*, whether evidence of a trade usage to the contrary would be admissible. Benj. p. 838.

differs from the transfer of a bill of lading. For, as it has already been stated (*ante*, p. 227), the transfer of a bill of lading to the buyer is equivalent to a delivery of the actual possession of the goods, *ipso facto*, and without the necessity of attornment on the part of the master of the ship. The reason for this distinction is stated by Lord Blackburn to be that "when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee and so take actual or constructive possession of the goods" (g).

S. 43 (1) (b).

At common law, dock warrants, warehouse-keepers' certificates, warrants, or orders for the delivery of goods, have always been regarded as mere "tokens of authority to receive possession," in spite of the repeated testimony of special juries of London merchants that a transfer of these documents, or, at any rate, of dock warrants and certificates, was regarded as a transfer of the possession of the goods they represent. On the other hand, by statute, these documents have been treated as "instruments used in the ordinary course of business as proof of the possession of goods," and as "authorizing the possessor of such documents to transfer the goods thereby represented." (See s. 1 (4) of the Factors Act, Appendix of Statutes, *post*, p. 325.) The legislature, in fact, regarded these documents as being, like bills of lading, the *symbols* of the goods which they represent.

Effect of transfer of warrants, delivery orders, &c.

(1) at common law.

(2) by statute.

The seller may countermand the delivery order if the bailee has not in the meantime attorned to the buyer (h).

By s. 47 (g. v.) (and s. 10 of the Factors Act, Appendix of Statutes, *post*, p. 327), the mere transfer by the buyer, being the lawful transferee thereof, of a document of title as defined by the latter Act (i), to a sub-buyer or pledgee in good faith and for value, divests the original seller's lien wholly or in part respectively.

(b) When the third person is not the seller's agent.

(b) Not being the seller's agent.

If the seller allow the buyer to deal with the goods as owner, as, e. g., to mark them or to spend money upon them, and to take away a part of them, this is a delivery of possession sufficient

(g) Blackb. p. 415.

Eastern Ry. Co. (1876), 34 L. T. N.

(h) *MacEwan v. Smith* (1849), 2 H.

S. 537.

L. 309; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Pooley v. Great*

(i) s. 1 (4); see also s. 62 (1) of this Act.

- s. 43 (1) (b). to divest his lien, although, as was stated at p. 229, *ante*, it would be insufficient if the goods were in the seller's own possession (k).

ILLUSTRATIONS.

1. A. sells to B. puncheons of rum, then in A.'s possession, and B. puts his initials on the casks, and gauges and coopers them. This fact does not divest A.'s lien. *Dixon v. Yates* (1833), 5 B. & Ad. 313.

2. A. sells to B. cigars, which are packed in B.'s boxes, and left on A.'s premises till called for. The packing is no delivery of possession to B., and A. has not lost his lien. *Boulter v. Arnott* (1832), 1 C. & M. 333.

3. A. sells to B. wine which is lying in A.'s bonded warehouse, and gives B. a delivery order by which he agrees to hold the wine to B.'s order. A.'s possession, as B.'s bailee, being subject to s. 41 (2), B. has not obtained possession through his agent, A., and A. has not lost his lien. *Townley v. Crump* (1836), 4 A. & E. 58.

4. A. sells to B. some casks of butter and gives him a delivery order on C., the warehouseman, with whom B. lodges the order, and who assents thereto. A. has lost his lien, as B. has obtained possession through C., his agent. *Harman v. Anderson* (1809), 2 Camp. 243.

5. A. sells goods to B., giving him a delivery order on C., a warehouseman, with whom the goods are lodged. C. refuses to attorn to B. on the ground that the goods are standing in the name of a former owner, and have not been transferred into the name of A. A. has not lost his lien, as C. has not become B.'s agent to hold for him. *Lackington v. Atherton* (1844), 8 Scott, N. R. 38.

6. A. sells to B. timber, then lying on the land of C., who is not A.'s agent, B. to have liberty to enter on the land and remove the timber. B. marks all the timber and removes part. A. has lost his lien on all the trees, C.'s land being, under the circumstances, B.'s warehouse, which he could enter when he pleased. *Tansley v. Turner* (1835), 2 B. N. C. 151.

S. 43 (1) (c) **By waiver thereof.**—The seller's lien arises "by implication of law" (see notes to s. 39 (1), *ante*, p. 215); it may, therefore, under s. 55, be waived either by express agreement or by implication. "If a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum*" (l).

express, or implied, The seller may also waive his lien by implication in some one of the following ways:—

(i) By sale on credit. (i) By selling on credit (m), i. e., when time is given for payment, and no time fixed for delivery. "It is, of course, competent for the parties to agree expressly that the goods,

(k) *Tansley v. Turner* (1835), 2 Bing. N. C. 151; *Cooper v. Bill* (1855), 3 H. & C. 722; 34 L. J. Ex. 161; Benj. p. 840.

(l) Per Lord Westbury in *Chambers v. Davidson* (1866), 1 P. C. at p. 305; and see s. 55.

(m) See *ante*, p. 220.

though sold on credit, are not to be delivered until paid for; but unless this special agreement, or an established usage to the same effect in the particular trade of the parties, can be shown (n), selling goods on credit means, *ex vi terminorum*, that the buyer is to take them into his possession, and the seller is to trust to the buyer's promise for the payment of the price at a future time" (o).

(ii) By taking a bill, note, or other negotiable security in conditional payment of the price. (See notes to s. 38 (1) (b), *ante*, p. 211.)

(ii) By taking bill, note, &c. in conditional payment.

Here the waiver is conditional only, and the lien revives on the expiration of the period of credit, or on dishonour of the security taken in payment. But it is not *every* security that will exclude a lien. A bill or note being payable at a distant day will obviously exclude it, as credit is given. "As I understand the law," says Kay, J., in *Angus v. McLachlan* (p) (a case of an innkeeper), "it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it."

(iii) By assenting to the buyer's reselling or pledging the goods.

(iii) By assent to buyer's re-sale or pledge of goods.

The seller's assent may be given either *after* the sale or pledge has taken place (q), or by anticipation, *e.g.*, by transferring to the buyer some document relating to the goods which is by the custom of the trade negotiable, and which is issued for the purpose of enabling the buyer to re-sell or pledge the goods to which it refers (r). In these circumstances, the seller, by expressly or impliedly assenting to the resale or pledge, is deemed to represent that the goods are free from his lien, and is estopped from afterwards denying the representation to be true. (On this subject, see the notes to s. 47, *post*, p. 256.)

Judgment or decree for the price of the goods.—Sub-s. 2 is merely declaratory of the previous law (s).

(n) s. 55, *post*; and see *Field v. Lelean* (1861), 6 H. & N. 617; 30 L. J. Ex. 168, overruling on this point, *Spartali v. Benecke*, *infra*.

(o) Benj. p. 809; *Spartali v. Benecke* (1850), 10 C. B. 212; 19 L. J. C. P. 293.

(p) (1883), 23 Ch. D. at p. 335, quoting Tindal, C.J., in *Hovison v. Guthrie* (1836), 2 B. N. C. at p. 759.

(q) *Stoveld v. Hughes* (1811), 14

East, 308.

(r) *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205. Cf. *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. Ap. 491 (wharfinger's certificate); *Farmilos v. Bain* (1876), 1 C. P. D. 445 ("undertaking" to deliver).

(s) *Houlditch v. Desanges* (1818), 2 Stark. 337; *Scrivenor v. G. N. Ry. Co.* (1871), 19 W. R. 388.

S. 44.

Right of
stoppage
in transitu.

Stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Subject to the provisions of this Act.—*i.e.*, of ss. 45—47.

This section declares generally the right of the seller to stop goods in transit, as laid down in *Lickbarrow v. Mason* (l), leaving, as is submitted, the *mode* of the stoppage undefined, save in so far as *illustrations* of the method are given in s. 46 (1). (See the notes to that section.)

S. 44 applies when the property in the goods has passed to the buyer, and the seller has “parted with” the possession thereof by delivery to a carrier or other agent to forward. Such cases must be carefully distinguished from those in which, under s. 13 (1) (a), the seller has reserved “the right of disposal” when delivering to the carrier. “When this is the case, the solvency of the purchaser is beside the question. The right of stoppage *in transitu* is a right to interfere and prevent the buyer from taking actual possession, which he would *otherwise have a right* to take, and to undo the effect of an unconditional delivery to an agent to forward” (m), under s. 43 (1) (a).

The unpaid seller’s right of stoppage *in transitu* is derived, like his kindred right of lien, from the law merchant (n); it arises solely on the buyer’s insolvency, and is based upon the plain reason of justice and equity “that the goods of one man should not be applied in payment of another’s debts” (o). “If after the seller has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, [under s. 43 (1) (a),] is such a constructive delivery as divests the seller’s lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they

(l) (1793), 2 T. R. 63; 1 Sm. L. C. (9th ed.) p. 737.

(m) Blackb. p. 380.

(n) Blackb. p. 318.

(o) Per Lord Northington, L.C., in *D’Aquila v. Lambert* (1761), 2 Eden. at p. 77; S. C., Amb. 399.

reach the buyer's possession, and thus avoid having his property applied in payment of the debts due by the buyer to other people" (p).

S. 44.

The two essential conditions to the seller's exercise of the right of stoppage *in transitu* are (1) that the buyer is insolvent; and (2) that the goods are in course of transit (as defined in s. 45), i.e., are "in the custody of some third person, intermediate between the seller, who has parted with, and the buyer, who has not yet acquired, actual possession" (q).

Buyer . . . becomes insolvent.—Insolvency is thus defined by s. 62 (3):—"A person is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not." The additional words, "and whether he has become a notour bankrupt or not," are to be confined, presumably, to Scotland (r).

Meaning of
"insolvency."

The term "insolvency" has had attached to it, both at common law and by statute, a wider meaning than attaches to the term "bankruptcy." It imports a general inability to pay debts in the ordinary course of trade or business (s). The fact that the buyer has "stopped payment" has been held, as a matter of course, to amount to "insolvency" justifying stoppage *in transitu*; and the failure to pay one just and admitted debt would probably be sufficient proof of a general incapacity (t).

It is not necessary that the buyer should have been found, or should be, insolvent at the date of the stoppage, provided he be so in fact when the goods arrive at their destination. "If the buyer is then insolvent, the premature stoppage will avail for the protection of the seller; but if the buyer remain solvent, the seller would be bound to deliver the goods with an indemnification for the expenses which may have been incurred" (u).

The unpaid seller.—The seller may be wholly or partially unpaid (*ante*, p. 209). As to the persons who stand in the position

(p) Benj. p. 843.

(q) Per Parke, B., in *Gibson v. Carruthers* (1841), 8 M. & W. at p. 328, approved by Lord Cairns, in *Berdison v. Strang* (1868), 3 Ch. Ap. at p. 690; and by James, L.J., in *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. at p. 569.

(r) See Bell's Dict. Law of Scotland, p. 79.

(s) *Biddlecombe v. Bond* (1835), 4 A. & E. 332; *Parker v. Gossage* (1835),

2 C. M. & R. at p. 620, per Parke, B.; see the discussion of the term "insolvency" in *Reg. v. The Saddlers' Co.* (1863), 10 H. L. C. at p. 425, per Willes, J.; and in *In re Phoenix Bessemer Steel Co.* (1876), 4 Ch. D. 108 (C. A.).

(t) See Benj. p. 851.

(u) Benj. p. 852; see *The Constantia* (1807), 6 Rob. Adm. R. at p. 326, per Lord Stowell; cf. also *The Tigress* (1862), 32 L. J. Adm. at p. 101.

S. 44. of sellers, and have been held entitled to exercise the right of stoppage, see s. 38 (2), *ante*, p. 212.

Has the right of stopping them in transitu.—The right of stoppage can be exercised only over the *actual* goods while in transit. If the goods have been damaged in transit, the seller cannot claim a right of stoppage as to the proceeds of insurance accruing to the buyer in respect thereof (*x*). Nor, when the right to stop the actual goods has once been lost by the transfer of the bill of lading to a sub-buyer, can the seller claim to stop the proceeds of the sub-sale (*y*).

He may resume possession.—The effect of the exercise of the right is under s. 48 (1) to restore the seller to his old position, and not to rescind the contract. Stoppage *in transitu* is “a retaking by the unpaid vendor, either on the cancellation of the contract, as some people say, or, as I should rather say, on resuming possession for the purpose of insisting on his lien for the price” (*z*).

And as the possession of the goods must be *resumed with a view* to their retention “until payment or tender of the price,” the seller will acquire no new right of lien when the goods are delivered to him, *after* the termination of the transit, for some special purpose (*a*). The converse case, where the seller’s lien is not divested by delivery to the buyer as *special* bailee, is noticed *ante*, p. 229.

“The unpaid seller’s right of stoppage is higher in its nature than the carrier’s lien for his *general* balance (*b*), though not for the special charges on the goods sold; and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods whilst in transit, by process out of the Mayor’s Court of the city of London” (*c*).

In course of transit.—Defined by s. 45.

Until payment or tender of the price.—Such payment or tender divests the resumed lien. (See s. 38 (1) (*a*).)

ILLUSTRATIONS.

1. A. sells goods to B., and sends them by C., a carrier, to L. directed to B. B. becomes insolvent, and A. stops the goods in transit. On

(*x*) *Bernadson v. Strang* (1866), 3 Ch. 588.

(*y*) Per Lords Selborne and Blackburn in *Kemp v. Falk* (1880), 7 App. Ca. at pp. 577, 582; cf., however, judgment of Cotton, L.J., in *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. at p. 638.

(*z*) Per Cotton, L.J., in *Phelps v. Comber* (1886), 29 Ch. D. at p. 821.

(*a*) *Valpy v. Gibson* (1847), 4 C. B. 837.

(*b*) *Oppenheim v. Russell* (1802), 3 B. & P. 42.

(*c*) *Smith v. Goss* (1808), 1 Camp. 282; Benj. p. 860.

arrival of the goods at L., they are, by mistake of C.'s clerk, delivered to B. A. may maintain trover against B.'s assignees in bankruptcy. *Litt v. Cowley* (1816), 7 Taunt. 169.

S. 44.

2. A. sells goods to B., and consigns them to him by C., a carrier. B. becomes insolvent, and A. stops the goods in transit, and requires C. to re-deliver to him. C. nevertheless delivers to B. C. is liable to A. in the value of the goods for his wrongful act in delivering to B. after A.'s notice, as A. is entitled to resume possession. *Pontifex v. Midland Ry. Co.* (1877), 3 Q. B. D. 23.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

Duration of transit.

This sub-section states the general rule as to the duration of the transit. The following sub-sections show its special application to particular facts.

In course of transit.—The principles of law which relate to the duration of the transit are clearly settled; the difficulty arises in their application to the facts and circumstances, often complex or equivocal, of each particular case. The transit commences when the seller parts with the possession of the goods to a carrier for the purpose of their transmission to the buyer, up to which moment the seller may exercise his right of lien, as already described; it ceases when the buyer, or his agent for custody, takes actual possession of the goods. In some cases there is no transit, because the carrier is the buyer's servant. There is then no delivery to "a carrier" within this section. For example, the buyer may send his own cart, or barge, or ship, for the goods, and then a delivery of the goods to the carter, or bargeman, or master of the ship (unless the seller receives his power of disposal under s. 19 (2)), is a delivery into the buyer's possession (d), and the right of stoppage *in transitu* never exists. The only question, then, which arises for ascertaining the duration of the transit is, In what capacity has the agent taken possession of the goods? Is he an agent to forward the goods to the buyer, or is he an agent to hold goods at the buyer's disposal?

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(d) See, however, per Jessel, M.R., in *Merchant Banking Co. of London v. Provincial Banking Co.* (1877), 5

Ch. D. at p. 219, where he treats the question as one of fact, and not of law.

S. 45 (1).

To a carrier or other bailee.—The chief difficulty arises when the agent acts in two capacities, as, *e.g.*, as a carrier, and also as bailee, *e.g.*, as a warehouseman or wharfinger. The carrier may then lodge the goods in his warehouse or on his wharf, either as a place of deposit in connection with the carriage, *i.e.*, “for the purpose of transmission,” or as a place of deposit subject to the buyer’s orders. In such a case, as the fact of possession “is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts” (*e*).

“Goods may be still in transit, though lying in a warehouse to which they have been sent by the seller on the buyer’s orders. Goods sold in Manchester to a merchant in New York may be still in transit while lying in a warehouse in Liverpool. The question, and the sole question, for determining whether the *transitus* is ended is, In what capacity the goods are held by him who has the custody? Is he the buyer’s agent to *keep* the goods? or, the buyer’s agent to *forward* them to the destination intended (*f*) at the time the goods were put in transit? If, in the case supposed, the goods in the Liverpool warehouse are there awaiting shipment to New York, in pursuance of the buyer’s original order to send him the goods to New York, they are still in transit, even though the parties in possession in Liverpool may be the general agents of the New York merchant for selling as well as forwarding goods. But if the buyer ordered his goods to Liverpool only, and they are kept there awaiting his further instructions, they are no longer in transit. They are in his own possession, being in possession of his agent, and may be sold in Liverpool or shipped to the East, or disposed of at the will and pleasure of the buyer” (*g*). And it is well observed by Lord Blackburn (*h*) that, “it then becomes a question depending upon what was done, and what was the intention with which it was done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point.”

The term “carrier” in this connection includes the master of the buyer’s own ship, or ship demised to him, when the circumstances of the case show that the seller has interposed the master as a carrier between himself and the buyer, as where he takes

Term “carrier” may include master of buyer’s own ship.

(*e*) Blackb. p. 364.

(*f*) *i.e.*, not necessarily by the terms of the contract, or directions to the seller *at the time*. See p. 241, *infra*, and per Lord Esher, M.R., in

Bethell v. Clark (1887), 20 Q. B. D. at p. 617.

(*g*) Benj. p. 859.

(*h*) Blackb. p. 335.

the bill of lading to his own order. Ordinarily, of course, the delivery of the goods on board the buyer's own ship, or ship demised to him, is a delivery to the buyer's agent, who then "takes delivery." "But if the seller desire to restrain the effect of a delivery of goods on board the buyer's own vessel, he may do so by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not an *agent to receive possession for the buyer*. This point was decided in *Turner v. Trustees of Liverpool Docks* (i), and that case was recognized as settled law in *Schotsmans v. Lancashire and Yorkshire Ry. Co.* (k), decided by the full Court of Chancery Appeals" (l). "And there is no difference in the effect of the delivery, whether the buyer's ship was expressly sent for the goods, or whether it was a general ship belonging to the buyer, and the goods were put on board without any previous special arrangement" (m).

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ILLUSTRATION.

A. sells goods to B., and delivers them on board B.'s own ship, employed as a general trader, and takes the bill of lading to the order of B. The transit is ended on shipment, as B.'s agent has received the goods, A. not having restricted the delivery by taking the bill to his own order. *Schotsmans v. L. & Y. Ry. Co.* (1867), 2 Ch. Ap. 332.

In *In re Bruno, Silva & Son* (n), the seller took a receipt from the mate of the buyer's own ship, and then handed it to the buyer's agent, who thereby got the bill of lading; and it was held that the transit ended on shipment. The case would be apparently otherwise if the carrier was a third person (o).

As to the effect of delivery on board the buyer's chartered ship, see sub-s. 5, *infra*.

For the purpose of transmission.—It will be useful here to cite the definition of the transit given by Lord Tenterden (p), and amplified by Lord Esher (q). "Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by

Lord Tenterden's definition of transit.

(i) (1851), 6 Ex. 543.

(k) (1867), 2 Ch. Ap. 332.

(l) *Benj.* p. 855.(m) *Ibid.* p. 856.

(n) (1887), 56 L. T. N. S. 577.

(o) See per Cur. in *Lyons v. Hoffmug*

(1890), 15 Ap. Ca. at p. 398.

(p) Abbott on Shipping, Part 3, ch. 9, p. 374 (5th ed.); Part 4, ch. 10, p. 409 (12th ed.).

(q) *Loc. cit.* in *Kendal v. Marshall*

(1883), 11 Q. B. D. at p. 364.

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the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly."

Goods, therefore, may be in course of transit—

- (1.) While being *transported*, so long as they are in possession of the carrier as carrier (*r*), and it is immaterial that the carrier is nominated or appointed by the buyer (*s*);
- (2.) While *deposited*, so long as they are in the possession of the carrier as carrier, or in the possession of some other bailee in course of transmission to the buyer (*t*).

To the buyer.—The buyer, or a person to whom the buyer directs the goods to be sent (*u*).

Until the buyer or his agent in that behalf.—The buyer's "agent" includes any one to whom the buyer's rights have been transferred, either by contract as a sub-buyer (*x*), or by operation of law, as the buyer's trustee in bankruptcy (*y*). *Quere*, whether the sheriff, on an execution against the buyer, has the same right? (*z*)

Takes delivery.—*i.e.*, a transfer of possession (see s. 62 (1)). "The actual delivery to the buyer or his agent, which puts an end to the *transitus*, may be at the buyer's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods (*a*), or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself" (*b*).

It sometimes happens that the buyer contemplates a particular destination for the goods, and then the question arises whether the destination contemplated by the buyer was or was not also the ultimate goal as between him and the seller: in other words,

(*r*) *Lickbarrow v. Mason* (1794), 1 Sm. L. C. (9th ed.) 737, and notes; per Cur. in *Ex parte Cooper* (1879), 11 Ch. D. at p. 78.

(*s*) *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560 (C. A.); and the numerous cases cited in Benj. p. 854, note (*t*).

(*t*) *Kendal v. Marshall* (1883), 11 Q. B. D. at p. 365, per Brett, L.J.; *Edwards v. Brewer* (1837), 2 M. & W. 375; *James v. Griffin* (1837), 2 M. & W. 623; *Ex parte Watson* (1877), 5 Ch. D. 35.

(*u*) Per Cotton, L.J., in *Ex parte*

Golding, Davis & Co. (1880), 13 Ch. D. at p. 636; per Brett, M.R., in *Ex parte Miles* (1885), 15 Q. B. D. at p. 44.

(*x*) *Dixon v. Yates* (1833), 5 B. & Ad. 313, 341.

(*y*) *Scott v. Pettit* (1803), 3 B. & P. 469.

(*z*) See per Chambre, J., in *Oppenheim v. Russell* (1802), 3 B. & P. at p. 54.

(*a*) *Scott v. Pettit*, *supra*; *Rowe v. Pickford* (1817), 8 Taunt. 83.

(*b*) Per Parke, B., in *James v. Griffin* (1836), 1 M. & W. 20.

whether the "course of transit" continues, *as between the parties*, until the goods reach their destination. If, previously to the goods reaching that destination, the goods continue in the hands of a carrier *as such*, it is immaterial whether or not the buyer may have communicated to the seller the place to which the goods are to be sent (*c*); in that case the transit, as between the parties, is a transit between the seller and the destination. "What is said," however, "may be a material fact to be considered, because it may determine when the transit ended" (*d*), *i.e.*, may determine whether the ultimate destination of the goods was the destination *as between the seller* and the buyer, or whether it was only the destination on a *fresh* transit.

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Destination contemplated by buyer may be also the end of the transit.

Usually, however, the destination is communicated, either at the time of the order or subsequently (*e*), by the buyer to the seller; and often it is indicated, or even expressly agreed upon by the terms of the contract of sale (*f*). These cases are comparatively simple, and the transit continues until the destination fixed by the buyer has been reached, unless it is interrupted in the way mentioned in sub-s. 2, *infra*.

Where, however, the transit from the seller to the buyer is complete, the destination as between the parties is reached, and it is immaterial that there is an ulterior destination for the goods involving a fresh transit, not from the seller to the buyer, but from the buyer to some third person (*g*).

In cases where an ulterior destination is contemplated, the test for determining whether the goods have reached the end of the transit is this, Is the seller competent to give instructions to the shipping or forwarding agent, in whose possession the goods are, as to the transmission of the goods to the ulterior destination, or do the goods in the hands of the shipping or forwarding agent await the buyer's instructions? (*h*). The test was laid down by Lord Ellenborough (*i*) in these words: "The goods had so far gotten to the end of their journey that they waited for new

or may be only the ulterior destination.

Test for determining in such cases whether the transit is ended.

(*c*) *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560.

(*d*) Per Brett, M.R., in *Kendal v. Marshall* (1883), 11 Q. B. D. at p. 364.

(*e*) *Ex parte Rosevear China Clay Co.* (1879), *supra*.

(*f*) Per Cotton, L.J., in *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. at p. 636; *Ex parte Watson* (1877), 5 Ch. D. 35.

(*g*) Per Cotton, L.J., in *Kendal v. Marshall*, *supra*, at p. 367.

(*h*) *Kendal v. Marshall* (1883), 11 Q. B. D. 356; *Ex parte Miles* (1885), 15 Q. B. D. 35; *Bethell v. Clark* (1887), 19 Q. B. D. 553.

(*i*) In *Dixon v. Baldwin* (1804), 5 East, at p. 186, adopted by Lord Esher, M.R., in *Ex parte Miles* (1885), 15 Q. B. D. at p. 44, and in *Bethell v. Clark* (1888), 20 Q. B. D. at p. 619.

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orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that, without such orders, they would continue stationary." When there is an ulterior destination, it is immaterial that the buyer's instructions are given before or after the contract of sale was made, or before or after the original instructions to the seller to deliver to the agent(k). There is a peculiar difficulty in applying the test when the agent is both a carrier and a bailee; and the character in which he holds possession of the goods is ambiguous, and must be decided by an analysis of the evidence in the case, such as the original contract, the subsequent correspondence, invoices, shipping documents, &c., which must be interpreted from a business point of view.

ILLUSTRATIONS [Of transit not ended].

1. A. sells goods to B. and consigns them by C., a carrier, directed to B. On arrival, C. partially unloads the goods at B.'s wharf, but afterwards, hearing of B.'s insolvency, and that he had absconded, re-ships them in his barge. The transit is not ended, as C. still holds the goods as carrier. *Crawshay v. Eades* (1823), 1 B. & C. 181.

2. B. buys goods of A. and orders them to be forwarded to London. A. gives C., B.'s agent, a delivery order for the goods, making them deliverable on board a vessel, which order C. indorses to D., a wharfinger. D. hands the order to E., a keelman, who puts the goods on board. The vessel moors in the port of London, and F., another wharfinger, by B.'s order, receives the goods into his lighter, when they are stopped by A. The transit is not ended, as all these steps form part of the course of transmission of the goods to London. *Jackson v. Nicholl* (1839), 5 B. N. C. 508.

3. B., having bought a cargo of timber of A., to be dispatched by a certain ship, becomes bankrupt. Upon the arrival of the ship, B.'s trustee in bankruptcy goes on board and tells the captain that he is come to take possession, and touches some of the timber. The captain tells him that he will deliver when he is satisfied with regard to freight. A. then stops the goods. The transit is not ended, as the goods had not reached the actual possession of the buyer, and the captain had not agreed to hold the goods as his bailee so as to give B. constructive possession. *Whitehead v. Anderson* (1842), 9 M. & W. 518.

4. A. agrees to supply goods to B. from time to time, B. to consign them to C. at Shanghai for sale on his account, and A. to have a lien on the bill of lading for each separate shipment and on the proceeds of the sale thereof. A. sends goods, marked "Shanghai," directed to a ship specified by B., and bound for that place. B. fails. A. may stop the goods at any time before they reach Shanghai, that being the transit contemplated (1) by express agreement, (2) by implication from the fact that A. had authority, without any fresh order from B., to send direct to Shanghai. *Ex parte Watson* (1877), 5 Ch. D. 35.

5. A. sells goods to B., and ships them to him at Falmouth. On arrival, the goods are lodged in the warehouse of C., the agent of the carrier, the course of business being that C. should hold the goods subject to the orders of the consignee and payment of freight. Before the arrival of the goods, B., who was bankrupt, had absconded. A.

(k) Per Cotton and Brett, L.JJ., in *Kendal v. Marshall* (1883), 11 Q. B. D. 356.

then stops the goods. This stoppage is good, as B., being absent, could not constitute C. his agent to hold the goods, and the goods, accordingly, were in C.'s warehouse in the course of their transmission to B. *Ex parte Barrow* (1877), 6 Ch. D. 783.

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6. A. sells to B. a quantity of china clay, to be delivered free on board a ship at a certain port, but B. does not tell A. the destination of the vessel. B. chartered a vessel to convey the clay, and it is put on board. Before the vessel leaves the harbour B. becomes insolvent, and A. stops the goods. The transit is not ended, because the goods are still in the hands of a carrier as such, the circumstances of the case showing that both A. and B. contemplated a further journey after delivery on board. *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560 (l).

7. B., in London, orders goods of A., at Wolverhampton. The order does not specify the destination of the goods. Afterwards, B. directs that they are to be delivered on board a particular ship "to Melbourne, loading in the East India Docks." A. delivers the goods to C., a railway company, to be forwarded to the ship. C. deliver them to D., their agent, a lighter company, who put them on board the ship. B. becomes insolvent, and, after the ship has sailed, A. gives notice of stoppage. The transit is not ended on shipment, as the captain had no authority to receive the goods otherwise than as a carrier to Melbourne, and, consequently, he holds the goods as carrier as far as that place. *Bethell v. Clark* (1887), 20 Ch. D. 615 (m).

8. B. orders goods of A. to be sent to C., a shipowner, to be carried from S. to K. in a particular vessel, on which B., as he informs A., also intends to travel to K. A. sends the goods to C.'s wharf, and obtains a receipt showing that A. was the shipper and B. the consignee, and that the goods were going to K. A. hands B. the receipt, and B. obtains a bill of lading, in which he is named as consignee, but A. is not mentioned therein as shipper. On the voyage B. becomes bankrupt, and A. stops the goods. The stoppage is good, as C. all along held the goods only as carrier to K., and not as agent for B. *Lyons v. Hoffnung* (1890), 15 Ap. Ca. 391.

ILLUSTRATIONS [Of transit ended].

1. A. sells to B. goods and consigns them by C., a carrier, to whom B. had given general orders to deliver to D., a packer. D. awaits B.'s orders as to the ultimate destination of all goods sent. D. is not an agent to forward, and the goods while in his hands are not in transit. *Scott v. Pettitt* (1803), 3 B. & P. 469 (n).

2. B. orders goods of A., and directs them to be forwarded to C. at Hull "to be shipped to Hamburgh as usual." It is C.'s duty to await B.'s orders before shipping the goods. B. fails, and A. stops the goods in the hands of C. The transit is ended, because C. was B.'s agent to take delivery of the goods and to keep them subject to B.'s instructions. *Dixon v. Baldwin* (1804), 5 East, 175 (o).

3. A. sells to B. goods, and consigns them, at B.'s request, to C. to be forwarded to V., but C. is bound to await B.'s orders to forward. The goods are put by C. on board a ship for V., but are re-landed by B.'s orders, and sent back to A. for re-packing. Although A. knows that the goods were intended to go to V., yet the transit ends when the

(l) Followed in *Brindley v. Chilgwin*
State Co. (1885), 55 L. J. Q. B. 67.

(n) Cf. also *Rowe v. Pickford* (1817),
8 Taunt. 83; *Dodson v. Wentworth*
(1842), 4 M. & G. 1080.

(m) Approved in *Lyons v. Hoffnung*
(1890), 15 Ap. Ca. 391.

(o) See also *Valpy v. Gibson* (1847),
4 C. B. 837.

S. 45 (1). goods reach the hands of C.; *a fortiori*, when B. had exercised ownership by re-landing the goods. *Valpy v. Gibson* (1847), 4 C. B. 837.

4. A. sells goods to B. in Yorkshire and ships them to C., his own agent, at Liverpool, to whom he also sends the bill of lading drawn to order or assigns, and a bill of exchange to be accepted by B. A. sends B. an invoice showing that the goods were shipped on account of B. in Yorkshire. On arrival of the goods, C., on acceptance by B. of the bill of exchange, transfers to B. the bill of lading. B. indorses the bill to D., a carrier, who obtains possession of the goods. The transit ends when D., B.'s agent, takes delivery of the goods, although A. knew that B. lived not at Liverpool, but in Yorkshire, as the transit prescribed by A. ended at Liverpool. *Ex parte Gibbes* (1875), 1 Ch. D. 101.

5. A. sells to B. goods, nothing being said at the time of sale of the place of delivery. B. arranges with C. & Co., forwarding agents at G., that the goods should be sent to them and should be shipped by them to a further destination. On inquiry by A., B. orders the goods to be sent to C. & Co. at G., and A. consigns them to C. & Co. by a railway company. On arrival at G., the company give C. & Co. notice of arrival, and that they would be liable for warehouse rent. B. then becomes insolvent, and A. stops the goods. The transit is ended when the goods come under the control of C. & Co., they receiving their orders from B. independent of A., and consequently the contemplated destination of the goods was, as between A. and B., the possession of C. & Co., and not the further destination. *Kendal v. Marshall* (1883), 11 Q. B. D. 356.

6. B. orders of A. boots, to be marked "E. M., Kingston, Jamaica," and to forward the boots to C. & Co. at S. for shipment per Moselle. A. forwards the boots to C. & Co., instructing them to "forward as directed," and gives them particulars^a with the destination and the consignee in blank. B. instructs C. & Co. to forward to E. M., Kingston, Jamaica. A. is aware that the boots were intended for Jamaica, and on B.'s insolvency stops them at Kingston. Having regard to (1) the fact that the mark placed on the goods did not show that A. was to forward to Jamaica; (2) B.'s order to forward only to C. & Co.; and (3) the fact that A. took this view by leaving the destination and consignee's name blank, the contemplated transit for the boots was from A. to C. & Co., and A. stopped too late. *Ex parte Miles* (1885), 15 Q. B. D. 39.

7. Goods are ordered of A., by C., B.'s agent, deliverable on board B.'s ownship, bound, as A. knows, for America. The goods are there delivered, and the mate's receipt taken by A. is given to C., who gets the bill of lading to his own order. The above facts show that the transit of the goods ends when B.'s agent takes delivery. *In re Bruno, Silva & Son* (1887), 56 L. T. N. S. 577 (p).

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

ILLUSTRATION.

S. 45 (2). A. buys goods of B., and directs them to be sent by a carrier to C. Before arrival at C., the carrier, at A.'s request, delivers the goods to him. The transit is determined. *Per Parke, B., in Whitehead v. Anderson* (1842), 9 M. & W. at p. 534.

(p) Cf. remarks of Cave, J., in *Bethell v. Clark* (1887), 19 Q. B. D. at p. 562.

Before the Act, the law was already well settled that the buyer may, *with the carrier's consent*, anticipate delivery of the goods, and so determine the transit (q). S. 45 (2).

But it had been questioned whether the buyer can determine the transit by a *wrongful* taking possession of the goods, *i.e.*, when the carrier does not assent, and is not obliged to assent, to the premature delivery (r). It is true that in the judgment in *Whitehead v. Anderson* (s) (where the point arose and was argued, although the decision did not turn upon it) the Court expressed a contrary opinion. "If the vendee take them (the goods) out of the possession of the carrier, with or *without the consent of* the carrier, there seems to be no doubt that the transit would be at an end, though in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action"; but Lord Blackburn argues very forcibly that the law discountenances violence, and that it is inconsistent with public policy that a man should benefit by his own wrongful act against a third person. But it may be, as he goes on to say (t), that, though the carrier is not bound to deliver the goods unless his charges are tendered, his right is merely to retain possession subject to the orders of the buyer, not derogatory to his lien. Having regard, however, to the language of this sub-section, as compared with s. 43 (1) (b), and sub-s. 6 to this section, where qualifying words are employed, there would appear to be no distinction intended between a rightful and a wrongful taking of delivery, and the opinion of Parke, B., in *Whitehead v. Anderson*, *supra*, would seem to be adopted. It is to be noted that, by sub-s. 6, in the converse case of a wrongful withholding of delivery by the carrier, it is provided that the transit shall cease.

The appointed destination.—For the meaning of this term, see sub-s. 3, *post*, p. 246.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the

Semble, no distinction between a rightful and a wrongful taking of delivery.

(q) *Whitehead v. Anderson* (1842), 9 M. & W. 518, 534, approved in *L. & N. W. Ry. Co. v. Bartlett* (1861), 7 H. & N. 400; 31 L. J. Ex. 92 (not a case of stoppage *in transitu*); cf. also *Cork Distilleries Co.'s Case* (1874), L. R. 7 H. L. 269; and per Bowen, L.J., in *Kendal v. Marshall* (1883), 11 Q. B. D. at p. 369.
 (r) Blackb. p. 374.
 (s) Per Parke, B., 9 M. & W. at p. 534.
 (t) at p. 377.

S. 45 (3).

buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

This sub-section states a particular instance of the buyer's "taking delivery" under s. 45 (1). It is a "constructive possession" within the meaning of the extract from Mr. Benjamin quoted below.

Appointed destination.—"The mere arrival of the goods at destination will not suffice to defeat the seller's rights. The buyer must take actual, if he has not obtained constructive, possession" (r).

"When the goods have arrived at their destination, and have been delivered to the purchaser, or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the *transitus* is at an end" (s).

Meaning of
"destina-
tion."

The term "destination," as used in the cases and text-books, is used in one of three senses: (1) as synonymous with the place to which the goods are consigned; (2) as their ulterior destination contemplated by the buyer, the "further destination" of the present sub-section; and (3) as synonymous with the end of the transit. A good instance of the use of the word in all three senses is afforded by the case of *Ex parte Miles* (t), the facts of which are set out in the illustration, *ante*, p. 244. There, the further destination of the goods sold was Jamaica; the place to which the goods were consigned was Southampton, and the end of the transit was the possession obtained by the buyer's shipping agents at the latter place.

It is obvious, from the language of sub-s. 3, that the word "destination" is here, as also in s. 45 (2), used in the first sense mentioned above, that is to say, it has a *local* signification only, as in the extracts from Mr. Benjamin and *Bethell v. Clark* above quoted.

The carrier acknowledges to the buyer.—The next point to note under this sub-section is, that after the goods have reached the place of destination, but are still in the possession, under s. 45 (1), of the carrier or other bailee for "the purpose of transmission," as, *e.g.*, a warehouseman or wharfinger, the transit is not at an end until the buyer "takes delivery" under s. 45 (1), *i.e.*, under this sub-section, until the carrier or other bailee agrees to hold the goods no longer as carrier, but as the buyer's

(r) Benj. p. 879.

(1887), 19 Q. B. D. at p. 562.

(s) Per Cave, J., in *Bethell v. Clark*

(t) (1885), 15 Q. B. D. 39.

agent, i.e., attorns to the buyer (*u*). Both the buyer and the carrier must assent to the change in the character of the possession; neither can the carrier convert himself into a bailee without the buyer's assent (*x*), nor can the buyer force the carrier to become his bailee without the carrier's assent (*y*).

It seems not to have been decided what particular acts done by the buyer constitute evidence of an agreement to attorn. It is doubtful whether the mere act of marking the goods or taking samples from them is sufficient, unless accompanied by such circumstances as show that the carrier intends to keep the goods as the buyer's agent (*z*). There must be some act of ownership by the buyer; he must deal with the goods as his own. The change of character from carrier to bailee may, and often does, take place by virtue of some contract or course of dealing between the parties (*a*).

The carrier *may* become the buyer's bailee, while still retaining his lien for unpaid freight or other charges (*b*), but the fact of the carrier's retention of his lien is relevant to disprove an agreement to attorn (*c*). The question is always one of intention.

ILLUSTRATIONS.

1. B., in Birmingham, orders sugar of A., in London. A. sends it by C., a carrier, who notifies B. of the arrival of the sugar. B. takes away a part of the sugar, and takes samples of the rest, and requests C. to keep the sugar till he receives directions from him. The transit is ended, as C. has become B.'s bailee to hold the sugar for him. *Foster v. Frampton* (1826), 6 B. & C. 107.

2. A. sells goods to B., deliverable in the Thames, and ships them to B. On arrival the captain calls on B. for instructions, and B. instructs him to land them at D.'s wharf, which is done; but B., being in insolvent circumstances, does not intend to take possession, though D. understands that he is to hold for B. D. has not attorned to B., as

(*u*) *Ex parte Cooper* (1879), 11 Ch. D. 68.

(*x*) *James v. Griffin* (1837), 2 M. & W. 623.

(*y*) *Jackson v. Nicholl* (1839), 5 Bing. N. C. 508; *Whitehead v. Anderson* (1842), 9 M. & W. 518.

(*z*) Per Parke, B., in *Whitehead v. Anderson* (1842), 9 M. & W. at p. 535; *Foster v. Frampton* (1826), 6 B. & C. 107, where there were such circumstances; but see per Littledale, J., who treated the taking of samples as a complete act of ownership: *Valpy v. Gibson* (1847), 4 C. B.

837, per Wilde, C.J.; cf. cases under s. 43 (1) (b), *ante*, pp. 229, 231, as to acts of marking, &c., constituting a delivery of possession to divest seller's lien.

(*a*) Per Parke, B., in *Whitehead v. Anderson*, *supra*; per Erle, C.J., in *Bolton v. Lancashire and Yorkshire Ry. Co.* (1866), L. R. 1 C. P. at p. 438.

(*b*) *Allan v. Gripper* (1832), 2 Cr. & J. 218; per Lord Blackburn in *Kemp v. Falk* (1882), 7 Ap. Ca. at p. 584.

(*c*) *Kemp v. Falk*, *supra*; *Ex parte Cooper* (1879), 11 Ch. D. 68, C. A.

S. 45 (3).

S. 45 (3).

B. had no intention to constitute D. his agent, although he concealed this fact from D. *James v. Griffin* (1837), 2 M. & W. 623 (d).

3. A. sells goods to B., and ships to him at F. by C., a carrier. On arrival at F., C. warehouses the goods with D., his agent, whose custom is to notify the arrival to a buyer, and state that he held the goods forthwith on his behalf. C. is unable to do this, as B. had absconded. A. then stops the goods. The stoppage is good, as C. still held the goods as carrier, being unable to get B.'s assent to his holding the goods as his agent. *Ex parte Barrow* (1877), 6 Ch. D. 783.

4. A. sells and consigns timber to B. by ship. On arrival of the ship, C. (B.'s assignee in bankruptcy) goes on board, and says he is come to take possession, and touches some of the timber. The captain says he will deliver when paid his freight. C.'s touching the timber is no taking of possession by him; nor has the carrier acknowledged C.'s right to the goods; and A. may stop them. *Whitehead v. Anderson* (1842), 9 M. & W. 518.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

S. 45 (4).

This is a corollary of sub-s. 3.

If the buyer reject the goods after they have reached their destination, he has no intention to take actual or constructive possession; the carrier, therefore, continues in possession of the goods as carrier, and the transit is not at an end (e).

An insolvent buyer may thus refuse to take possession of the goods, and so prolong the transit; and his conduct does not amount to a fraudulent preference in favour of the seller (f).

ILLUSTRATION.

A. sells to B. cotton goods lying at the station of C., a railway company, and directs C. to forward the goods to B. B. refuses to receive them on the ground of defective quality, and returns them by C. to the same station to the order of A., who refuses to receive them back. The goods remain in C.'s possession until B.'s bankruptcy, a month later. The transit is not determined, and A. can exercise the right of stoppage. *Bolton v. Lancashire and Yorkshire Ry. Co.* (1866), L. R. 1 C. P. 431.

(5.) When goods are delivered to a ship chartered

(d) Cf. *Jackson v. Nicholl* (1839), 5 M. & W. 508, where the carrier's assent was wanting. *shire Ry. Co.* (1866), L. R. 1 C. P. 431; 35 L. J. C. P. 137.

(e) *Bolton v. Lancashire and York-*

(f) Benj. p. 487, where the cases are collected in note (n).

by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer.

S. 45 (5).

This sub-section is confined to cases where the ship is chartered by the buyer, and is not extended to cases where the ship is the buyer's own property. The latter fall under s. 45 (1), and the buyer's agent, the master of the ship, then "takes delivery" of the goods, unless the effect of the shipment is restricted by the seller, as shown *ante*, p. 238, under s. 45 (1). But "the circumstances of the particular case" under this sub-section may show that the chartered ship of the buyer is practically his own, having been *demised* to him, in which case the rule above stated in s. 45 (1), as to the effect of the bill of lading being taken to order, would apply, and the master of the buyer's ship would receive the goods as carrier only.

S. 45 (5).

In the ordinary case of a charter-party by the buyer, however, delivery on board the chartered ship has not ordinarily the effect of a delivery on board the buyer's ship, because, by the terms of the charter-party, the master of the ship is the ship-owner's, and not the charterer's agent. He therefore receives possession of the goods as a carrier, and the voyage forms part of the transit (g).

Effect of delivery on board buyer's chartered ship.

"Whether a vessel chartered by the buyer is to be considered his own ship depends on the nature of the charter-party. If the charterer is, in the language of the law merchant, owner for the voyage—that is, if the ship has been *demised* (h) to him, and he has employed the captain, so that the captain is his servant—then a delivery on board of such a chartered ship would be a delivery to the buyer; but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterers the exclusive use and employment of the vessel, then a delivery by the seller of goods on board is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case to be determined by the terms of the charter-party" (i).

Distinction between an ordinary charter and a demise of the ship.

(g) *Berndtson v. Strang* (1867), L. R. 4 Eq. 481; 3 Ch. 588; *Ex parte Rosewear China Clay Co.* (1879) 11 Ch. D. 560; Blackb. p. 352.

(h) As to what amounts to a de-

mise, see *Meiklereid v. West* (1876), 1 Q. B. D. 428; *Wagstaff v. Anderson* (1880), 5 C. P. D. 171.

(i) Benj. p. 856, and cases there cited in note (a).

S. 45 (5).

Apart from the distinction between an ordinary charter and a demise, the "circumstances of the particular case" may show that the possession of the master of a chartered ship is the destination of the goods, and the end of the transit. *Fowler v. McTaggart*, cited in the Illustrations, *infra* (though a case of demise), may apparently be explained on this principle also, the voyage being a "roving one"; and Wood, V.-C. (though he does not mention the case by name), apparently alluded to it, and thus explained it, in *Berndtson v. Strang* (j).

ILLUSTRATIONS.

1. A. agrees to sell to B. china clay to be shipped at F. B. verbally chartered a ship to convey the clay from F. to G. The clay is loaded at F. The receipt of the clay by the master of the ship is as carrier, and not as B.'s agent, as a further transit was contemplated by A. and B., and there are no facts to show that the master was B.'s agent to take possession. *Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560.

2. B. chartered a ship to go to P., and there receive from A., B.'s agent, a complete cargo of merchandise, the ship to return to L. and deliver the goods on freight being paid. A. ships the goods, B. then being insolvent, and afterwards stops them before their arrival at L. The receipt of the goods by the master of the ship is by him as carrier, as by the charter-party there was merely a contract of carriage between B. and the shipowner, although a complete cargo was to be loaded by B. *Bohtlingk v. Inglis* (1803), 3 East, 381 (k).

3. B. chartered a ship for a space of three years, B. to victual the ship, pay the master and crew, and to have the entire disposition and complete control over the vessel. B. then buys goods of A. for a mercantile adventure, and A. ships the goods. The receipt of the master is by him as agent for B., as the ship was B.'s by virtue of the charter-party. *Fowler v. McTaggart* (or *Kymer*), cited in *Bohtlingk v. Inglis*, *supra*, at p. 396 (l).

4. B. orders goods of A., to be shipped to L., and sends his chartered ship for them. A. ships the goods, and takes the bill of lading to his own order, which he indorses to B. The receipt by the master is a receipt by a carrier only to L., as the circumstances of the case, viz., an ordinary charter of the ship by B., and the form of the bill of lading, show that the master was interposed between A. and B. as a carrier. *Berndtson v. Strang* (1887), 4 Eq. 481; 3 Ch. Ap. 588.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(j) (1867), 4 Eq. at p. 490.

(k) *Inglis v. Usherwood* (1801), 1 East, 515 (at first sight containing contrary dicta), was explained in this case.

(l) See Abbott on Shipping (10th

ed.), p. 400. The facts are set out more fully in *Inglis v. Usherwood*, *supra*. See, also, *Scholsmans v. Lancashire and Yorkshire Ry. Co.* (1867), 2 Ch. Ap. 332, where the ship was the buyer's own.

This sub-section accords with the decision in *Bird v. Brown* (m), where it was held that the transit was at an end when the goods had reached their destination, and when the consignee, having demanded the goods and tendered the amount of freight, would have taken possession of them but for the wrongful delivery of them to other parties. S. 45 (6).

Wrongfully.—Lord Blackburn suggests that “the refusal must be so tortious as to render the middleman liable in trover” (n).

The converse case of the buyer wrongfully taking possession without the carrier’s consent is dealt with under s. 45 (2), *ante*, p. 245.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

Part delivery of the goods.—As part delivery has the same effect upon the seller’s right of stoppage when the goods are in course of transit as it has upon the seller’s lien when the goods remain in the seller’s possession, the reader is referred to s. 42 and notes thereon, *ante*, p. 223, where the subject of part delivery is discussed. S. 45 (7).

An agreement to give up possession.—*I. e.*, between the carrier making delivery and the buyer, or his agent, and to the effect that either (1) the part delivery shall be considered a delivery in the due course of the delivery of the whole, or that (2) the carrier shall be considered the buyer’s agent, *i. e.*, an acknowledgment by him under sub-s. 3, *supra*. *Slubey v. Heyward* (o), and *Hammond v. Anderson* (p), were two cases explained on this latter principle in *Ex parte Cooper*, *infra*. See notes to s. 42, *ante*, p. 224.

ILLUSTRATIONS.

1. A. sells and consigns goods to B., and takes a bill of lading making the goods deliverable to B. on his paying freight. C., the master of the ship, delivers part of the goods to B., who pays part of the freight, but does not tender the rest. The facts do not show any agreement that part delivery should operate as a delivery of the

(m) (1850), 4 Ex. 786.

(n) Blackb. p. 375.

(o) (1795), 2 H. Bl. 504.

(p) (1804), 1 B. & P. N. R. 69.

S. 45 (7). whole, C. retaining his lien for freight, and B. not tendering it. *Ex parte Cooper* (1879), 11 Ch. D. 68 (q).

2. A. sells and ships eighty quarters of wheat to B., who accepts a bill for the price. B., being insolvent, assigns the wheat to C., an assignee for the general body of B.'s creditors. C., on the arrival of the wheat, takes samples, and sells seventy quarters, which are delivered to the buyers. The part delivery to C. is a constructive total delivery, as the facts show that C. was intended, being assignee for B.'s creditors generally, to take possession of all the wheat. *Jones v. Jones* (1841), 8 M. & W. 431.

How stop-
page in
transitu is
effected.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of the seller. The expenses of such re-delivery must be borne by the seller.

S. 46 (1). **May exercise his right.**—The word “may,” used in this sub-section, will doubtless be interpreted in its ordinary sense as a potential and enabling term only, as in the case of the similar words “it shall be lawful” (r). That is to say, the modes of stoppage in transit here mentioned are not intended to be exhaustive, but are given only as illustrations of the more usual method of exercising the general right of stoppage conferred by s. 44. It should be remarked also that the word “must” is used in the latter part of the sub-section, and also in sub-s. 2.

(q) See also *Bolton v. Lancashire and Yorkshire Ry. Co.* (1866), L. R. 1 C. P. 431, per Willes, J.; *Kemp v. Falk* (1882), 7 Ap. Ca. at p. 586,

per Lord Blackburn.

(r) See *Julius v. Lord Bishop of Oxford* (1880), 5 Ap. Ca. 214.

The law has not prescribed any particular mode of exercising the right of stoppage *in transitu* (s). The seller or his agent may, of course, take actual possession of the goods, but the means usually adopted is for the seller to give notice of his claim to the carrier, and to forbid delivery to the buyer, or require that the goods shall be held subject to his (the seller's) orders (t). But any act relied upon as a stoppage *in transitu* must be done with that intent, and by virtue of a right in respect of the goods paramount to that of the buyer, though it may in fact be done with the buyer's consent (u).

The act relied upon as a stoppage *in transitu* may be done by an unauthorized person, if the act be ratified by the seller *before* the end of the transit (x), but not afterwards, as in the latter case the ordinary principle of the law of agency would apply, viz., that a third person's *vested* right cannot be prejudiced by a ratification (y). But the posting of a letter of ratification, though not received till after the end of the transit, is effectual (z).

A notice given by the seller to hold the proceeds of the sale of the goods subject to his orders is not an effectual stoppage, because the seller expresses no intention of retaking possession of the goods (a).

A demand of the bill of lading is an effectual exercise of the right of stoppage (b). It has not been decided whether the notice to stop can be sent to the consignee instead of to the shipowner or shipmaster (c); but, having regard to the permissive character of the words used in this sub-section, as above pointed out, there appears to be nothing therein inconsistent with a notice given to the consignee being held a good stoppage under s. 44, if the Courts decide that it otherwise falls within the meaning of the word "stop" in the latter section.

Such notice may be given.—The clause introduced by the above words is taken almost verbatim from the judgment of Parke, B., in *Whitehead v. Anderson* (d). It was questioned, so

(s) In an early case Lord Hardwicke said that the seller was justified in recovering his goods by any means not criminal. *Snee v. Prescott* (1743), 1 Atk. at p. 250.

(t) Benj. p. 882.

(u) Per Cur. in *Phelps v. Comber* (1886), 29 Ch. D. at pp. 822, 824, 826; *Mills v. Ball* (1801), 2 B. & P. 457.

(x) *Bird v. Brown* (1860), 4 Ex. 786.

(y) Story on Agency, s. 246.

(z) *Hutchings v. Nunes* (1863), 1 Moo. P. C. 243.

(a) *Phelps v. Comber*, *supra*.

(b) *Ex parte Watson* (1877), 5 Ch. D. 35.

(c) *Phelps v. Comber*, *supra*; see per Cotton, L.J., at p. 822, and per Fry, L.J., at p. 826.

(d) (1842), 9 M. & W. at p. 534.

- S. 46 (1). recently as 1880, by two very eminent judges^(e), whether there is any duty imposed on the shipowner to communicate the seller's notice to the master of the ship, but this sub-section adopts the opinion expressed by Lord Blackburn in *Kemp v. Falk* (^f), that it is *the duty* of the shipowner who receives a notice to stop goods to forward it with reasonable diligence to the master of the ship; but if, using reasonable diligence, delivery of the goods be made before the notice is received, he is not responsible.

ILLUSTRATIONS.

1. A. sells goods to B., and consigns them by C., a carrier, directed to B. at L. B. being insolvent, A. gives notice to C. to deliver the goods to A.'s agent, and C. gives notice to his firm at L., which reaches the firm before the arrival of the goods. This notice to C. is a good stoppage in transit. *Litt v. Cowley* (1816), 7 Taunt. 169.

2. B. orders goods of A., who consigns them by a carrier to B. B., being in insolvent circumstances, writes to A. informing him of his situation, and declining the goods. A. then gives the carrier notice to stop. This stoppage is good. *Mills v. Ball* (1801), 2 B. & P. 457.

3. C., the agent of A., the seller of the goods, with the consent of B., the buyer, who is bankrupt, takes possession of the goods in order to sell them and apply the proceeds towards bills drawn upon B. for the price. This is not a stoppage, as it was not intended as such, and was not done adversely to B. *Siffken v. Wray* (1805), 6 East, 371.

- S. 46 (2). **The carrier . . . must re-deliver the goods.**—The right to stop includes the right to demand re-delivery (^g), and a carrier who after a valid stoppage delivers to the consignee, is guilty of a conversion (^h). The carrier, however, delivers at his peril, and in case of conflicting claims, ought to interplead (ⁱ).

As a *duty* is here laid upon the carrier, the seller's right will be enforceable by action under s. 57, as in *Pontifex v. Midland Railway Co.* (^h).

The expenses of such re-delivery.—This clause was inserted in the Act while it was passing through Parliament. The editors are aware of no previous case dealing with the subject.

The sub-section casts the liability for expenses upon the seller, but does not say that the expenses shall be tendered to the

(^e) James and Bramwell, L.JJ., in *Ex parte Falk* (1880), 14 Ch. D. at pp. 450, 455.

(^f) (1882), 7 Ap. Ca. at p. 585; see also per Cur. in *Whitehead v. Anderson* (1842), 9 M. & W. 518; and per Mathew, J., in *Bethell v. Clark* (1887), 19 Q. B. D. at p. 560.

(^g) *The Tigris* (1863), 32 L. J. Ad. 97.

(^h) *Pontifex v. Midland Ry. Co.* (1877), 3 Q. B. D. 23.

(ⁱ) *The Tigris*, *supra*, at p. 102; cf. *Litt v. Cowley* (1816), 7 Taunt. 169.

carrier. *Qy.*, whether or not the carrier is liable for a refusal to deliver without an averment of readiness and willingness to pay on the part of the seller? The carrier's liability for a refusal to *accept* goods for carriage was dependent at common law on such an averment (*k*). The words, however, "the expenses must be borne by the seller" appear to cast them on the latter only as between him and the buyer; moreover, an absolute duty of re-delivery is cast upon the carrier.

S. 46 (2).

Pontifex v. Midland Ry. Co., *supra*, throws no light upon the point. That case, however, was one of *conversion* by the carrier.

Re-sale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Effect of sub-sale or pledge by buyer.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Subject to the provisions of this Act.—See s. 25 (2), re-enacting s. 8 of the Factors Act, 1889 (Appendix of Statutes, *post*, p. 327).

S. 47.

The sale may or may not be accompanied by the transfer from the seller to the buyer of a document of title (as defined by

(*k*) *Pickford v. Grand Junction Ry. Co.* (1841), 8 M. & W. 372.

- S. 47.** s. 1 (4) of the Factors Act, 1889) (*l*). *Firstly*, when the sale is not so accompanied, the seller's rights, as unpaid seller, are not affected by the buyer's dealing with the goods by way of sub-sale or pledge (*m*). Parke, B., in delivering his opinion in *Dixon v. Yates, infra*, said (*n*): "There was no delivery to the sub-vendees, and the rule is clear that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title defeasible on non-payment of the price by the first vendee."

ILLUSTRATIONS.

1. A. sells goods to B., who accepts bills for the price. B., while the bills are running, re-sells the goods to C., who pays B. the price. B. becomes insolvent, and his bills are dishonoured. A. has not lost his lien against C. *Dixon v. Yates* (1833), 5 B. & Ad. 313.

2. A. agrees to sell to B. twenty-four hogsheads of sugar f. o. b. a ship, and delivers them on board, and takes the lighterman's receipt therefor in his own name, but does not exchange it for a bill of lading. B. re-sells the sugar to C., who pays B. the price. B. stops payment. A. has not lost his lien. *Craven v. Ryder* (1816), 6 Taunt. 433 (*o*).

Seller may be estopped from asserting his rights.

"Unless the seller has assented thereto."—But although the original seller's rights, as unpaid seller, are unaffected by the buyer's sub-sale or pledge of the goods, the seller may, by giving his assent thereto, be estopped from asserting his rights. The seller may either expressly or by his conduct assent to the sub-sale or pledge, and so recognize the title of the subsequent buyer or pledgee (*p*).

ILLUSTRATION.

A. sells to B. timber, then lying at A.'s wharf, and takes a bill for the price. B. sub-sells to C., who informs A. of the sale, and A. assents thereto, and allows C. to mark the timber. B. becomes insolvent, and the bill is dishonoured. A. has no lien as against C. *Stoveld v. Hughes* (1811), 14 East, 308.

The assent may be given after the sub-sale or pledge has taken place (*p*), or beforehand, as, *e. g.*, by the seller transferring to the

(*l*) Appendix of Statutes, *post*, p. 325.

(*m*) *Craven v. Ryder* (1816), 6 Taunt. 433; per Parke, B., in *Dixon v. Yates* (1833), 5 B. & Ad. 313; *McEwan v. Smith* (1849), 2 H. L. C. 309 (transfer of a delivery order before Factors Act, 1877); *Griffiths v. Perry* (1859), 1 E. & E. 680.

(*n*) 5 B. & Ad. at p. 342.

(*o*) Sometimes inaccurately referred to as the exercise of the right of stoppage *in transitu*.

(*p*) *Stoveld v. Hughes* (1811), 14 East, 308 (case of express assent); *Pearson v. Dawson* (1858), E. B. & E. 448 (case of implied assent).

buyer at the time of the original sale a document relating to the goods, not being a recognized document of title, which contains a representation, express or implied (*g*), that the goods are free from any unpaid seller's rights, which representation the seller is estopped from afterwards denying to be true (*r*). It is otherwise, of course, if the document transferred does not contain any such representation, and no usage of trade or course of dealing between the parties can then give to it the effect of a document of title (*s*).

S. 47.

Sale or other disposition.—The words "other disposition" (which are also found in the Factors Act, 1889, ss. 2 (1) and 5), as used here, and the similar words, *infra*, "pledge or other disposition for value," must, it is submitted, be limited to transactions *ejusdem generis*, i. e., in the nature of a sale or pledge respectively. The Act does not, like the Factors Act, apply to contracts of exchange of goods, though, as originally drafted, it was made so to apply. It was held, under an earlier Factors Act (6 Geo. 4, c. 94), that the term "disposition" did not include any transaction which was essentially distinct from a sale or pledge (*t*). See the notes to s. 25 (1), *ante*, p. 163.

Meaning of
"other dis-
position."

Secondly, when the sale is accompanied by the transfer from the seller to the buyer of a "document of title" to the goods sold. The buyer may then, on a sub-sale or pledge of the goods, transfer the document to the sub-buyer or pledgee, and the seller's rights, as unpaid seller, are thereby wholly or partially divested, as the case may be, as shown in this section. Previous to the Factors Act, 1877, a bill of lading was the only document of title the transfer of which from a buyer to a sub-buyer or pledgee divested the seller's rights (*u*). With regard to all other "documents of title"—dock warrants, delivery orders, warehouse warrants, &c.—it was settled that the subsequent transfer differed in effect from that of a bill of lading, and did

Transfer of
documents of
title by buyer
to sub-buyer,
&c.

Effect thereof
previous to
Factors Act,
1877.

(*g*) Evidence of mercantile usage, or the course of dealing between the parties, is admissible to interpret the language of the document. See s. 55, *post*, and notes.

(*r*) *Merchant Banking Co. v. Phoenix Beamer Steel Co.* (1877), 5 Ch. D. 205. The case was decided in January, 1877, and the Factors Act, 1877, became law in August of the same year; it is conceived that the iron "warrants" in question in the case were "documents of title" within

the meaning of the Factors Acts, 1877 and 1889. See *post*, p. 259.

(*s*) *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. Ap. 491 ("wharfinger's certificate"); *Farmiloe v. Bain* (1876), 1 C. P. D. 445 ("undertaking to deliver").

(*t*) *Taylor v. Kymer* (1832), 3 B. & Ad. 320; *Taylor v. Trueman* (1830), 1 M. & M. 453.

(*u*) *Lickbarrow v. Mason* (1793), 6 East, 21, H. L.; 1 Sm. L. C. (9th ed.) 737, and notes.

S. 47. not impair the original seller's rights of lien and stoppage *in transitu*, so long as the buyer or his transferee had neither procured the acceptance of the order, nor taken actual possession of the goods, before the order was countermanded (x). As to dock warrants and certificates, special juries of London merchants repeatedly testified that it was the custom to treat a transfer of these documents as an actual transfer of the possession of the goods which they represent (y). It is believed, however, that it was never the custom of merchants to regard delivery orders in the same light. In the ordinary course of business a delivery order is presented to the warehouseman or wharfinger who has the custody of the goods, and exchanged for a warrant; but the goods having then already reached their destination, the negotiation of the delivery order can have no effect on the seller's right of stoppage *in transitu* (z). By s. 5 of the Factors Act, 1877, the mercantile custom was recognized by the Legislature, and the same effect was given to the transfer of any document of title (including in that definition both dock warrants and delivery orders) which had been previously given at common law to the transfer of a bill of lading. That provision is retained by s. 10 of the Factors Act, 1889 (Appendix of Statutes, *post*, p. 327), and is substantially reproduced by s. 47 of this Act; that section stating in detail what was contained by implication in s. 10 of the Factors Act, that is, the effect of the transfer of a document of title upon the unpaid seller's rights in the case of a re-sale and pledge respectively, the Factors Act declaring only in general terms that the transfer shall have the same effect as the transfer of a bill of lading had previously had at common law on the right of stoppage *in transitu*. It must be remembered that the seller's *lien* is already defeated by the original transfer of the bill of lading from the seller to the buyer, which operates as an actual delivery of the goods.

Effect of
Factors Act,
1877,

and Factors
Act, 1889.

Definition of
document of
title.

A document of title to goods.—A document of title, by s. 62(1), has the same meaning as it has in the Factors Act. It therefore includes (see s. 1 (4) of the Factors Act, Appendix of Statutes, *post*, p. 325), "any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or

(x) *McEwan v. Smith* (1849), 2 H. L. C. 309; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Farina v. Home* (1846), 16 M. & W. 119.

(y) See per Dallas, C.J., in *Lucas v. Dorrien* (1817), 7 Taunt. 278 (dock

warrants).

(z) As to the law previous to the Factors Act, 1877, see *McEwan v. Smith* (1849), *supra*; *Farina v. Home* (1846), *supra*; Benj. p. 829; Blackb. p. 415.

purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented" (a).

The important part of this definition is its concluding clause. The question whether any particular document, *e.g.*, a wharfinger's certificate (which is expressly included as a "document of title" in the Factors Act, 1825), comes within the general words of the definition, must depend upon whether the issuer of the document has represented therein that the goods to which it refers are free from any unpaid seller's rights. If the document contains such a representation, the person issuing it is estopped from setting up his claim as unpaid seller to the goods as against a *bond fide* holder of the document. Thus, when a wharfinger's certificate is in the form of a delivery warrant, making the goods deliverable to "A. B. or his assigns, by indorsement or otherwise," the certificate represents the goods, and is used as proof of the possession or control of them; it is then equivalent to a "document of title." If, on the other hand, the certificate states only that the goods are "ready for delivery," it is not intended to represent the goods nor to entitle the holder to possession of them; it is, then, not equivalent to a "document of title," and no alleged custom of trade can give to it the effect of one (b).

Has been lawfully transferred.—At common law a bill of lading is not negotiable like a bank note or a bill of exchange. It is not strictly a document of title in the sense that the holder thereof derives his title from the instrument itself, and not from the title of the person from whom he received it. The assignor of a bill of lading must have a title to the goods represented, or authority to act for one who has. An assignor who is a mere holder of the document, or who has found or stolen it, can transfer no interest to the assignee in the goods represented thereby (c). The expression "lawfully transferred" seems to have reference to this fact, and to require that the transferor of any document of title shall have, as in the case

(a) Cf. the definition given in s. 78 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and of "delivery orders" and "warrants" in ss. 69 and 111 of the Stamp Act, 1891 (54 & 55 Vict. c. 39) (Appendix of Statutes, *post*, pp. 329, 330).

(b) Recent cases upon the construction of trade documents, alleged to be "documents of title," are:

Gunn v. Bolekow, Vaughan & Co. (1875), 10 Ch. Ap. 491 (wharfinger's certificate); *Farmilos v. Bain* (1876), 1 C. P. D. 445 ("undertaking" to deliver); *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205 (iron warrant).

(c) *Per Cur. in Gurney v. Behrend* (1854), 3 E. & B. at pp. 633, 634.

S. 47. of the transferor of a bill of lading, a title to the goods represented by the document.

To any person as buyer or owner.—As the clause operates solely to defeat an unpaid seller's lien or right of stoppage *in transitu*, the original transfer must be, either from a seller to a buyer, or from a person "in the position of a seller," under s. 38 (2), *e.g.*, a consignor to a consignee. The consignor who has bought goods on his own credit, but on his principal's account, is, for the purpose of exercising the right of stoppage *in transitu*, in the same position as a seller *quoad* his principal, and it is conceived that the words "or owner" were added in contemplation of this case.

Effect of transfer of documents as between original seller and buyer.

And that person transfers.—S. 47 deals only with transfers of documents of title *from* a buyer, or person in the position of a buyer, and does not change the law as between the original seller and buyer. As between these parties, the common law distinction between bills of lading and other documents still applies, and a transfer of one of the last mentioned to the buyer will not divest the seller's lien without an attornment of the bailee in possession of the goods or actual possession by the buyer (*a*), whereas the transfer of a bill of lading will *mero motu* divest it. With regard to stoppage *in transitu*, neither at common law nor under this section is the right defeated by a transfer of a bill of lading as between seller and buyer (*b*); nor is it so defeated by the transfer of any other document to the buyer, or over again by him, at *common law*. It is now otherwise under this section with regard to the latter documents when re-transferred.

Who takes the document in good faith.—"In good faith" is defined by s. 62 (2) as "honestly . . . whether negligently or not." The definition, which is reproduced from the Bills of Exchange Act, 1882, is based upon the distinction pointed out by Lord Blackburn in *Jones v. Gordon* (*c*), between honest blundering or carelessness, and dishonest refraining from inquiry.

The transfer will be valid, as it was at common law before the statute, if the transferee honestly believes that there are no circumstances which render the document of title not fairly and honestly assignable (*d*). The fact that the transferee refrained from inquiring into the circumstances attending the transfer is

(*a*) Benj. pp. 826, 838.

(*b*) Unless the transfer is evidence that the ship was meant to be the destination of the goods. See per Cave, J., in *Bethell v. Clark* (1887), 19 Q. B. D. p. 562; and *In re Bruno*,

Silea & Son (1887), 56 L. T. N.S. 577.

(*c*) (1877), 2 Ap. Ca. at p. 628.

(*d*) *Salomons v. Nissen* (1788), 2 T. R. 681; *Vertue v. Jewell* (1814), 4 Camp. 31.

relevant to prove the absence of "good faith," but does not in itself amount to dishonesty (e). If the transferee knows that the original buyer or consignee has become insolvent the transfer is invalid; but it is otherwise when the transferee merely knows that the price of the goods remains unpaid, and consequently that the unpaid seller's rights still exist, because selling on credit is in the ordinary course of mercantile dealing (f).

S. 47.

For valuable consideration.—Includes apparently an antecedent debt.

ILLUSTRATION.

A. sells to B. a shipment of nuts. B., being already indebted to C., transfers to him the bill of lading of the nuts by way of securing the debt. C. receives the bill of lading in good faith. B. becomes insolvent before the ship arrives. A.'s right of stoppage *in transitu* is lost. *Leask v. Scott* (1877), 2 Q. B. D. 376 (g).

It is observable that this section appears to cover part of the same ground covered by s. 25 (2) (h), as it includes the particular case of a buyer obtaining possession of a document of title with the consent of the seller. The two sections, however, appear to differ in this way, that s. 25 (2) contains a proviso as to notice, which is not found in s. 47; moreover, as has been shown under s. 25 (2), and *supra* under this section, notice of a lien would be fatal under the former section, but not necessarily so under the latter. With regard to sales, the effect of the transaction on the seller's rights appears identical, and so also with regard to pledges, bearing in mind the right of redemption given to the seller by s. 12 (2) of the Factors Act, 1889 (Appendix of Statutes, *post*, p. 327).

This section compared with s. 25 (2).

Transfer was by way of sale.—When a sub-sale takes place, and a document of title has been absolutely transferred by the buyer to the sub-buyer, the unpaid seller's rights are wholly defeated when the price has been wholly paid by the sub-buyer before the original seller attempts to exercise them (i). The question has, however, been raised whether, when the price has not been wholly

(e) *Peck v. Derry* (1889), 14 App. Ca. 337.

(f) Per Cur. in *Cuming v. Brown* (1808), 9 East, 506, 515; cf. *Rodger v. Comptoir d'Escompte* (1868), L. R. 2 P. C. 393; *Vertue v. Jewell*, *supra*, per Lord Ellenborough.

(g) Where the Court of Appeal disapproved of the decision of the Privy Council to the contrary in *Rodger v. Comptoir d'Escompte*, *supra*. Note that the decisions of the Judicial

Committee, although entitled to great weight, are not binding in English Courts.

(h) See the notes to s. 25 (2), *ante*, p. 168.

(i) *Lickbarrow v. Mason* (1793), 1 Sm. L. C. 737; Benj. p. 889. The original seller's rights are equally defeated when the buyer has obtained the document by fraud, but with the seller's consent. *Pease v. Gloaghe* (1866), L. R. 1 P. C. 219.

S. 47.

Semble, no right of stoppage against the purchase-money of a sub-sale.

paid, the original seller may exercise his right of stoppage by intercepting, to the extent of his own unpaid purchase-money, the part of the price remaining unpaid in the hands of the sub-buyer. It has been twice decided by the Court of Appeal that he may do so (i), on the ground that the original seller can exercise his right without interfering with the rights of the sub-buyer. On the appeal to the House of Lords in *Ex parte Falk* (i), it became unnecessary to decide the point in question, because it was disclosed on the appeal that the sub-sale had in fact taken place without any transfer of a document of title (k). Lord Selborne, however, took occasion to dissent from the rule laid down by the Court of Appeal in *Ex parte Golding, Davis & Co.* (i). He assented to the proposition (l), "that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu* as against the purchase-money payable by them to their vendors; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*."

Lord Selborne's opinion has, apparently, been adopted by this Act, which speaks of the seller's right being *defeated*. It is submitted that this view undoubtedly accords with the principles of stoppage *in transitu*. The alleged right to intercept the unpaid purchase-money was stated by the Court of Appeal, in the cases above referred to, to be only an extension of the principle of *In re Westzinthus* and *Spalding v. Ruding* (Illustrations, *post*, p. 263), where there was a pledge of the bill of lading. But in both those cases the buyer transferred a *special* property only in the goods by pledging the bill of lading, and it was possible to give effect to the right of stoppage *in transitu*, as against the *general property* in the goods which remained in the buyer (m). The principle of those cases has no application when the buyer has resold the goods, or transferred the document of title to a sub-buyer, because *ex hypothesi* all the property in the goods has passed from the buyer, and nothing remains to which the right of stoppage can attach.

To defeat the seller's rights a document of title must have

(i) *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. 628, see per Cotton, L.J., at p. 638; *Ex parte Falk* (1880), 14 Ch. D. 446, see per Bramwell, L.J., at p. 457.

(k) *Kemp v. Falk* (1882), 7 Ap.

Ca. 573.

(l) 7 Ap. Ca. at p. 577. The other law lords declined to express an opinion upon the point.

(m) See on this point *Burdick v. Sewell* (1884), 10 Ap. Ca. 74.

been actually transferred to the sub-buyer; it is not sufficient that the document has been originally made out in the sub-buyer's name, but not transferred to him (*n*).

S. 47.

Transfer was by way of pledge.—"The seller's rights of stoppage *in transitu* may be defeated in part only, for the bill of lading [or other document of title] may be transferred as a pledge or security for the debt, and then in general the property in the goods remains in the buyer; but even if by agreement the property in the goods has been assigned as well as the possession, it is only a *special* property that is thus transferred, and the *general* property remains in the buyer (*o*). On these grounds, therefore, the seller's right of stoppage will remain, so far as to entitle him to any surplus proceeds after satisfying the creditor to whom the bill of lading was transferred as security; and the seller will have the further equitable right of insisting on *marshalling the assets*; that is to say, of forcing the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding on the goods of the unpaid seller" (*p*).

Seller's right of stoppage remains for surplus after pledge is satisfied;

and he may force pledgee to marshal the assets.

ILLUSTRATIONS.

1. A. sells and consigns goods worth 1,800*l.* to B. B. transfers the bill of lading to C. to secure an advance of 1,000*l.* B. becomes insolvent, and A. stops the goods. A. is entitled thereto after paying 1,000*l.* to C. *Spalding v. Ruding* (1843), 6 Bea. 376; *S. C.*, on appeal, 15 L. J. Ch. 374.

2. A. sells goods to B., who consigns them to C., his agent. B. indorses the bill of lading to a bank to secure an advance. During the transit C. sub-sells the goods to D., but without transferring to him a document of title (*g*). Before delivering to D., A. stops the goods. C. then hands to the bank the proceeds of the sub-sales. A. is entitled to the balance of the money after the bank's claim has been satisfied. *Kemp v. Falk* (1882), 7 Ap. Ca. 573.

3. A. sells and ships to B. twenty-three casks of oil, and sends him the bill of lading. B. indorses the bill of lading to C. as security for an advance, and also as further security for previous advances made on other goods of B. then in C.'s possession. A. stops the goods in transit. A. is entitled to call upon C. to satisfy his debt out of the proceeds of other goods of B. previously in C.'s possession, before he realizes the casks of oil. *In re Westzinthus* (1833), 5 B. & Ad. 817 (*r*).

Or other disposition for value.—See *ante*, p. 257, s. v., "sale or other disposition."

(*n*) *Ex parte Golding, Davis & Co.* (1880), 13 Ch. D. 628.

(*o*) *Burdick v. Sewell* (1884), 10 App. Ca. 74.

(*p*) Benj. p. 892. As to marshalling assets in Equity, see notes to *Aldrich v. Cooper*, 2 Tud. L. C. 82, 96 (ed. 1886).

(*g*) The document was a "cash receipt," on production of which the goods were delivered to the sub-buyer. See per Lord Blackburn at p. 684 of the report.

(*r*) For the same principle, see also *Ex parte Salting* (1883), 25 Ch. D. 148.

S. 48 (1).

Sale not generally rescinded by lien or stoppage in transitu.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

S. 48 (1).

“There can no longer be a reasonable doubt that the true nature and effect of this remedy of the seller (stoppage in transitu) is simply to restore the goods to his possession, so as to enable him to exercise his rights as an unpaid seller,—not to rescind the sale” (s).

Although the point seems never to have called for decision, the opinion has been expressed, both by judges and text-writers, more especially since 1819 (t), that the true effect of stoppage in transitu is to replace the seller in the same position as if he had not parted with the possession, and entitle him to hold the goods until payment of the price: in other words, to revest his lien, but not to entitle him to rescind the contract (u). On the other hand, it has been directly decided that the seller's lien, whether original or revested, is only the right to detain the goods sold until the price is paid, and not a right to rescind the contract (x). As an application of this principle, the trustee of a bankrupt buyer has been held entitled to recover nominal damages on account of the seller's breach of contract by stopping delivery after the insolvency of the buyer, a decision based upon the assumption that the contract had not been rescinded by the seller's subsequent exercise of his right of retention (y). This clause of the Act, therefore, is only declaratory of a principle which had been previously recognized in a catena of cases.

Subject to the provisions of this section—I. e., the case of a re-sale under sub-s. 4, *infra*.

(s) Benj. p. 898.

(t) The date of *Goodhart v. Lowe*, 2 Jac. & W. 349, referred to by Cairns, L.J., in *Schotsmans v. Lancashire and Yorkshire Ry. Co.* (1867), 2 Ch. Ap. at p. 340.

(u) *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; diss. Abinger, C.B.; per Lord Chelmsford in *Page v. Cowasjee* (1866), L.R. 1 P.C. 127; per Cairns, L.J., in *Schotsmans v. Lancashire and Yorkshire Ry. Co.* (1867), 2 Ch. Ap. 332; per Lord Blackburn in *Kemp v. Falk* (1882),

7 Ap. Ca. at p. 581; per Cotton, L.J., in *Phelps v. Comber* (1885), 29 Ch. D. at p. 821; cf. ss. 106, 107 of the Indian Contract Act.

(x) *Martindale v. Smith* (1841), 1 Q. B. 389.

(y) *Valpy v. Oaksley* (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; followed in *Griffiths v. Perry* (1859), 1 E. & E. 680; 28 L. J. Q. B. 204 (both cases of the seller's right of retention or of withholding delivery—a right analogous to stoppage in transitu).

ILLUSTRATIONS.

1. A. sells to B. six stacks of oats, to be paid for on a particular day. B. does not pay on that day, but afterwards tenders the price. A. then re-sells the oats. B. may maintain *trover* against A., as A.'s right was one only of lien (which was gone by B.'s tender), and not a right to repudiate the contract. *Martindale v. Smith* (1841), 1 Q. B. 889 (2).

2. A. sells to B. under one entire contract a quantity of mats, of flax, and other goods, and the flax is consigned to B. by railway, and delivered. The other goods go by water carriage, and on the insolvency of B. are successfully stopped by A. The flax is stopped after the end of the transit, and is afterwards seized in execution. Assuming the contract not to be divisible, the stoppage of the goods other than the flax does not revert in A. the property in the flax, as against the execution creditor. Per Cur., in *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

In addition to his lien and right of stoppage *in transitu*, the unpaid seller has the further right given by s. 39 (1) (c) of re-selling the goods subject to the conditions stated in sub-s. 3, *infra*. The exercise of this right of re-sale, which is analogous to the right possessed by a pledgee with a power of sale, does not, except in the case provided for in sub-s. 4 (*infra*), rescind the contract. (Sub-s. 1.) It follows that if the seller re-sell, he re-sells *quod* pledgee, and as the agent of the original buyer, to whom he remains liable for the difference between the contract price and the market price obtained on the re-sale, assuming the goods to have meanwhile risen in value; and if there be no proof of such difference, he still remains liable for nominal damages (a).

S. 48 (2).

This sub-section deals with the question of title, and seems to qualify the rule laid down in s. 21. With regard to s. 25 (1), see remarks below.

Before this Act, and independently of the Factors Acts, 1877 and 1889 (b), the question whether the second buyer acquired a good title to the goods depended on the fact whether the original buyer were in default or not. If he were not, he could maintain an action of *trover*, and recover possession of the goods in the

(a) See also *Groaves v. Ashlin* (1813), 3 Camp. 426.

(b) 40 & 41 Vict. c. 39, s. 3; 52 & 53 Vict. c. 45, s. 8.

(c) Benj. p. 804.

S. 48 (2). hands of an innocent second buyer (c) ; but otherwise if he were in default, because he had no immediate right to the possession (d).

Effect of this sub-section ;

particularly as compared with s. 25 (1).

It is conceived that this sub-section is intended to be merely declaratory of the pre-existing law. In order to confer a good title on a second purchaser, the seller must *lawfully* exercise his rights, i.e., the exercise must be justified by reason of the buyer's default or insolvency. It can scarcely be intended, for example, that a seller who wrongfully stops a cargo *in transitu*, and re-sells, can thereby deprive the original buyer of his remedy in trover. Thus in *Cohen v. Foster* (e), the buyer of a machine, having tendered the price *within* the fixed time, was held entitled to maintain trover against the seller who had subsequently sold it, and the question, as stated by Collins, J., was simply whether the buyer was in default or not. It is, however, important to note that such a result is apparently contemplated by s. 25 (1). As has been pointed out (*ante*, p. 161), the language of that sub-section is unqualified and wide enough to embrace the particular case of an unpaid seller who, being in possession of the goods sold, re-sells them even in wrongful exercise of his lien or right of retention ; and, if the transaction then be executed by transfer of the property and delivery of the goods or documents, and the second buyer acts in good faith and without notice, he will acquire a good title as against the original buyer, although the latter may not be in default at the time of the re-sale.

It is noticeable that this sub-section does not require want of notice and good faith in the second buyer, as is the case under s. 25 (1), which fact lends additional colour to the view that the original buyer should be in default.

If the above construction of this sub-section is incorrect, and the case of a buyer *not* in default is included therein, the only apparent differences between s. 48 (2) and s. 25 (1) (apart from the requirements of good faith, &c., under the latter section) is that, under the latter, the seller may sell the documents though he is not in possession of the goods, whereas, under the former, he must, *ex hypothesi*, be in possession of the goods, and also that under s. 25 (1) the sale must be executed by delivery or transfer of the goods or documents, whereas, under s. 48 (2), no such requirement is found.

(c) *Johnson v. Crédit Lyonnais Co.* (1877), 3 C. P. D. 32 ; and see *Cohen v. Foster* (1892), 61 L. J. Q. B. 643.

(d) *Lord v. Price* (1874) L. R. 9

Ex. 54 ; *Milgate v. Kebble* (1841), 3 M. & G. 101 ; Benj. pp. 804, 806.

(e) *Supra*.

(3.) Where the goods are of a perishable nature, S. 48 (3).
or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

Where the goods are of a perishable nature.—“It is admitted that perishable articles may be re-sold. It is difficult to say what may be considered as perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours” (f). Best, C.J., proceeds to extend the rule to non-perishable goods: “In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a re-sale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. Those which have been decided do not apply. . . . We are anxious to confirm a rule consistent with convenience and law. It is most convenient that when a party refuses to take goods he has purchased, they should be re-sold, and that he should be liable to the loss, if any, upon the re-sale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower” (g).

The Act contains no definition of the term “perishable goods.” Cf. s. 6 as to the sale of “perished” goods.

As to the sale of perishable goods by order of the Court *in an action*, see R. S. C., Ord. L., r. 2.

Where the unpaid seller gives notice.—The conditions as to notice of intention to re-sell, and as to granting a reasonable time for the buyer to pay or tender the price, are apparently new—at any rate, they do not seem to have been expressly laid down in any decided case (h), but the rule is so stated in the Indian Contract Act, s. 107. They are in accordance with the opinion expressed by Lord Blackburn (i), and with the reasoning of Best, C.J., in his judgment in *Maclean v. Dunn*, *supra* (f).

(f) *Maclean v. Dunn* (1828), 4 Bing. p. 798.

722, per Best, C.J.

(h) See 1 Smith, L. C. (9th ed.),

(g) See notes to *Lickbarrow v.* p. 798.

Mason (1793), 1 Sm. L. C. (9th ed.),

(i) *Treatise on Sale*, p. 446.

S. 48 (3).

It has been held that a notice merely to remove goods and pay the price will not justify the seller in re-selling (*j*).

And the buyer does not . . . pay.—These words would seem to apply *both* to the case of perishable goods and to the case where the seller gives notice of re-sale. In other words, there must be *default* in the buyer as regards the goods, whether perishable or not.

The term “buyer” will include the buyer’s trustee in bankruptcy, and, possibly, a sub-buyer from the bankrupt buyer (*k*).

Within a reasonable time.—This is a question of fact to be determined by a jury. (See s. 56, *post*.)

Recover . . . damages.—The effect of the re-sale not being to rescind the original contract, the seller’s remedy in damages, under s. 50, is not lost, since it does not depend upon his retaining dominion over the goods (*l*). And conversely, if there be a profit on the re-sale, the buyer is entitled thereto as damages for non-delivery (*m*).

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

ILLUSTRATION.

S. 48 (4).

A. sells to B. goods for 79*l.*, a condition of the sale being that upon B.’s default the goods may be re-sold. B. makes default, and A. re-sells for 63*l.* A. cannot recover 79*l.*, the original price, as the contract is rescinded, but he may recover 16*l.*, and the expenses of the re-sale. *Lamond v. Davall* (1847), 9 Q. B. 1030; 16 L. J. Q. B. 136.

This sub-section accords with the *dicta* in *Lamond v. Davall*, *supra*, and with the opinion expressed by Mr. Benjamin. No notice of re-sale, moreover, is required under this sub-section, as under the preceding.

When a right of re-sale has been expressly reserved by the

(*j*) *Greaves v. Ashlin* (1813), 3 722, 728; *Acebal v. Levy* (1834), 10 Camp. 426. Bing. 376.

(*k*) *Ex parte Stapleton* (1879), 10 Ch. D. 586, per Jessel, M.R., at p. 590. (*m*) *Greaves v. Ashlin*, *supra*; *Valpy v. Oakley* (1851), 16 Q. B. 241; *Griffiths v. Perry* (1859), 1 E. & E. 680.

(*l*) *Maclean v. Dunn* (1828), 4 Bing.

contract, as is commonly the case in sales by auction, the reservation is construed as a condition for making void the sale on the buyer's default (*n*); in such a case, if the goods are re-sold at a profit, the seller is entitled thereto; if at a loss, the buyer is liable for the amount thereof, and for the expenses attending the re-sale (*o*).

On the other hand, where no express reservation of the right to re-sell is made, "the effect of a re-sale being not to rescind the sale, the goods are sold by the unpaid seller *qua* pledgee . . . they are sold as being the property of the buyer, who is, of course, entitled to the excess if they sell for a higher price than he agreed to give" (*p*).

The following is believed to be an accurate summary of the law relating to the seller's right of re-sale.

The re-sale may take place under the following circumstances :—

S. 48 (4):

Summary of the law as to the seller's right of re-sale.

(1) *When the buyer is in default*.—The re-sale is then legal, but does not rescind the original contract (*q*), unless the right of re-sale was expressly reserved by the contract (*r*).

(a) *And insolvent*.—Insolvency may be, and generally is, construed as an offer to rescind, and the seller may then elect to treat the contract as rescinded, and re-sell the goods, giving the buyer's trustee in bankruptcy a reasonable time within which to pay the price (*s*).

(b) *And solvent*.—(i.) If the buyer, after default, afterwards tenders the price, the seller's right of re-sale is lost (*t*).

(ii.) If the buyer does not tender the price, the seller may re-sell perishable goods at once, and non-perishable goods subject to the conditions as to notice and reasonable time mentioned in sub-s. 3, *supra*. The seller may also sue for damages under the original contract (*u*).

(2) *When the buyer is not in default*.—The sale is then wrongful, and *a fortiori* does not rescind the contract. The buyer

(*n*) *Lamond v. Davall*, *supra*; confirming the dictum of the Court in *Hagedorn v. Laing* (1815), 6 Taunt. 162.

(*o*) Benj. p. 803.

(*p*) Benj. p. 795, quoting (*inter alia*) *Groves v. Ashlin* (1813), 3 Camp. 426.

(*q*) Benj. p. 803; Blackb. p. 463, where all the cases are collected; the contrary dictum of Holt, C.J., in

Langfoot v. Tyler (1705), 1 Salk. 113, has been overruled.

(*r*) *Lamond v. Davall* (1847), 9 Q. B. 1030.

(*s*) *Ex parte Stapleton* (1879), 10 Ch. D. 586.

(*t*) *Martindale v. Smith* (1841), 1 Q. B. 389.

(*u*) *Maclean v. Dunn* (1828), 4 Bing. 722; *Aebal v. Levy* (1834), 10 Bing. 376.

- S. 48 (4). has his remedy in trover for the full value of the goods, subject to deduction for the unpaid price, and can maintain an action for damages sustained by the wrongful sale, and recover to the extent of that injury (x).

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

Action for
price.

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

- S. 49 (1).** The remedies of the unpaid seller *against the goods*, comprising his rights of lien, stoppage *in transitu*, and re-sale, form the subject of Part IV. of this Act. Part V. proceeds to deal with the remedies of the unpaid seller *against the defaulting buyer* in a personal action either for the price of the goods or for damages for the non-acceptance of them, and also with the corresponding remedies of the buyer against a defaulting seller. Ss. 51—53, *post*.

“By the law of England, differing in this respect from the civil law, the buyer’s default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved. The principle at common law is, that the goods have become the property of the buyer, and that the seller has agreed to take for them the buyer’s promise to pay the price. If, then, the buyer fails to pay, the seller’s remedy is limited to an action for the breach of that promise, the damages for the breach being the amount of the price promised, to which may be added interest” (y).

(x) Per Cur. in *Page v. Cowasjee* (1866), 1 P. C. at p. 146; *Gillard v. Brittan* (1841), 8 M. & W. 575 (re-sale before delivery); *Stephen v. Wilkinson* (1831), 2 B. & Ad. 320 (re-sale after taking goods out of buyer’s possession); *Chinery v. Fiall* (1860),

5 H. & N. 288.

(y) Benj. p. 763; *Martindale v. Smith* (1841), 1 Q. B. 389, is the leading case on the subject. As to the seller’s right to recover interest, see the notes to s. 54, *post*, p. 290.

With regard to procedure, it may be stated generally that before the Judicature Acts the seller under a contract of sale, when the property in the goods had passed, could maintain an action for the price under the common *indebitatus* counts either—(1) *For goods sold and delivered*, this count being applicable when upon a sale of goods the property had passed and the goods had been delivered to the buyer, and the price was payable at the time of action brought (z); or (2) *For goods bargained and sold*, this count being applicable when, upon a sale of goods, the property had passed to the buyer, and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment (a). These counts were abolished by the Judicature Acts, but it is still necessary for the seller to aver such facts as would have formerly entitled him to maintain an action on one or other of the counts.

S. 49 (1).
Procedure.

This sub-section embraces both causes of action under the term "contract of sale," which, by s. 62, (1) includes both a bargain and sale and a sale and delivery. In the former case, the seller can avail himself of his personal remedy concurrently with his other remedies (as unpaid seller) against the goods. In the latter case his sole remedy is his personal action (as an ordinary creditor) for the price.

Where . . . the property . . . has passed.—The contract of sale being (under s. 1 (1)) a contract for the exchange of the property in goods in return for the price, the seller cannot ordinarily sue for the price unless the property has passed. The next sub-section shows when he can do so.

The rules for the passing of the property are stated *supra*, in ss. 16 *et seq.*

The buyer wrongfully neglects or refuses.—Generally speaking, the buyer is liable to pay for the goods on delivery, delivery and payment being ordinarily concurrent conditions under s. 28. But the sale may be upon credit, in which case the seller cannot maintain an action for the price until after the expiration of the period of credit. A bill or note taken for the price has the same effect as credit in postponing the right of action (b), and so also has an agreement to pay by bill or note which is not

Giving credit or taking bill or note postpones seller's right of action.

(z) Bullen & Leake on Pleading, p. 38.

(a) *Ibid.* p. 39.

(b) *Helps v. Winterbottom* (1831), 2

B. & Ad. 431; unless it is the intention of the parties that the bill or note should be taken in absolute payment.

S. 49 (1). given, and the seller cannot maintain an action for the price until the time when the bill or note would have matured (c).

As the bill or note is *prima facie* evidence of payment, the seller must account for the security before he can maintain an action for the price (d).

Under this sub-section the seller may maintain his action for the price, although the goods have been destroyed while in his possession, the goods being at the buyer's risk from the time when the property in them passed to him (e). (See s. 20.)

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

S. 49 (2). Although the general rule is, as stated in sub-s. 1, *supra*, that the property in the goods must have passed to the buyer in order to entitle the seller to recover the price, it is quite competent to the parties to agree that payment shall be made irrespective of delivery, and the buyer's refusal to pay the price will then be wrongful, although the goods have not been delivered, and the property in them remain vested in the seller (f).

ILLUSTRATION.

A. agrees to sell B. 1,000 tons of iron, to be delivered by a particular date, and B. agrees to pay for it on that date, whether he is ready to accept delivery or not. B. refuses to accept and pay for the iron. A. may recover from B. the whole price of the iron, although the property in

(c) *Mussen v. Price* (1803), 4 East, 147; *Dutton v. Solomonson* (1803), 3 B. & P. 582; unless credit was conditional on the security being in fact given; *Nickson v. Jepson* (1817), 2 Stark. 227, explained in *Paul v. Dod* (1846), 2 C. B. 800.

(d) Benj. p. 735; *Price v. Price* (1847), 16 M. & W. 232.

(e) Benj. pp. 277 *et seq.*, 716; *Castle v. Playford* (1870), L. R. 5 Ex. 165;

L. R. 7 Ex. 98; *Alexander v. Gardner* (1835), 1 Bing. N. C. 671; *Fragano v. Long* (1825), 4 B. & C. 219.

(f) *Dunlop v. Grole* (1845), 2 C. & K. 153; cf. *Castle v. Playford*, *supra*. As to the right of the parties to introduce into the contract any stipulations which they deem desirable, see per Blackburn, J., in *Calcutta, &c. Co. v. De Mattos* (1863), 32 L. J. Q. B. at p. 328.

the iron has not passed to B., and no specific iron has been appropriated by A. to the contract. *Dunlop v. Grote* (1845), 2 C. & K. 153.

S. 49 (2).

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

By the law of Scotland, in the absence of an express stipulation as to the date when interest shall commence to run, interest runs from the stipulated date of payment (g).

S. 49 (3).

The English law differs from the law of Scotland on this point, and the seller cannot recover interest on the price due, unless, *e. g.*, the buyer has agreed to pay by a bill or note. (See s. 54, *post*, p. 290, and notes.)

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

The buyer wrongfully neglects or refuses to accept and pay for the goods.—As to the duty of the buyer to accept and pay for the goods, see Part III. of this Act, *ante*, pp. 173 *et seq.*

S. 50 (1).

The seller may maintain an action.—“When the seller has

(g) 1 Bell's Comm. at p. 694.

S. 50 (1). not transferred to the buyer the property in the goods which are the subject of the contract, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery; the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may re-sell or not at his pleasure. But his only action against the buyer is for damages for non-acceptance; he can in general only recover the damage that he has sustained (*h*), not the full price of the goods" (*i*), except in the particular case mentioned in s. 49 (2). The buyer may incur further liability under s. 37 for delay in taking delivery of the goods.

S. 50 (2). **The measure of damages.**—The first part of the general rule, laid down in *Hadley v. Baxendale* (*h*), and applicable to every class of contract, and which appears to be contained in the words "directly and naturally" in sub-s. 2, requires that the damages arise "naturally, *i.e.*, according to the usual course of things, from the breach of contract itself." The rule is stated and considered under s. 51, *post*, p. 278; it is of less importance in the seller's action for the buyer's breach of contract by non-acceptance, because the question of special damages does not ordinarily arise, and the loss sustained by the seller does not exceed the price of the goods contracted to be sold.

S. 50 (3). **Where there is an available market for the goods.**—Sub-s. 3 embodies the particular application of the general rule stated in sub-s. 2 to cases where there is a market. There must be some particular place where the seller can re-sell the goods, and then the test is the difference between the contract price and the "market" (*l*) price of the goods at the time fixed by the contract for acceptance. The test is only a *prima facie* one, because it is, of course, subject to the provisions of ss. 54 and 55.

The reason for the rule is thus stated by Tindal, C. J. (*m*): "Where a contract to deliver goods at a certain place is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and

(*h*) *Laird v. Pim* (1841), 7 M. & W. 478.

(*i*) *Benj.* p. 754.

(*k*) (1854), 9 Ex. 341.

(*l*) For the definition of a market,

see per James, L.J., in *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. at p. 25.

(*m*) In *Barrow v. Arnaud* (1846), 8 Q. B. at p. 609.

buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them" (n).

S. 50 (3).

The measure of damages will be the difference between the contract price and the market price "at the time or times" (e.g., when the goods are deliverable by instalments (o)) fixed for acceptance, not at the time when the buyer gives notice to the seller of his intention not to accept.

When the buyer gives notice of his intention not to accept the goods, the seller may elect either to bring his action at once, as for a breach of the contract, or to await the time fixed by the contract for acceptance (p); but in either case the damages will be assessed with reference to the latter date (q).

In the case of an agreement to sell future goods, if the seller elect to sue at once, he may do so without manufacturing or tendering the rest of the goods, and it is sufficient for him to aver that he was ready and willing to perform the contract.

Damages on breach of agreement to sell future goods.

ILLUSTRATIONS.

1. A. agrees to sell to B. a quantity of corn, to be delivered at a certain place. Before its arrival B. repudiates the contract, but A. tenders the corn on its arrival. The difference between the contract price and the market price of the corn at the date of B.'s repudiation is 93*l.*; at the date of tender it is 218*l.* A. may recover 218*l.* *Philpotts v. Evans* (1839), 5 M. & W. 475 (r).

2. A. agrees to manufacture and sell to B. iron railway chairs. After delivery of a part, B. gives notice that he will not accept more. A. thereupon discontinues manufacturing the rest of the chairs. A. may sue B. for damages for non-acceptance without manufacturing and tendering the rest of the chairs, and such damages are the amount which will put A. in the same position as if he had been allowed to

(n) The following cases, arranged in order of date, illustrate the rule as to the measure of damages: *Busk v. Davis* (1814), 2 M. & S. 397; *Gainsford v. Carroll* (1824), 2 B. & C. 624; *Maclean v. Dunn* (1828), 4 Bing. 722; *Boorman v. Nash* (1829), 9 B. & C. 145; *Philpotts v. Evans* (1839), 5 M. & W. 475; *Lamond v. Davall* (1847), 9 Q. B. 1030; *Valpy v. Oakeley* (1851), 16 Q. B. 941; *Griffiths v. Perry* (1859), 1 E. & E. 680; 28 L. J. Q. B. 204; *Boswell v. Kilborn* (1862), 15 Moo. P. C. 309; *Silkstone Coal Co. v. Joint Stock Coal Co.* (1877),

35 L. T. N. S. 668; *Ex parte Stapleton* (1879), 10 Ch. D. 586, per Jessel, M.R., at p. 590.

(o) As to deliveries by instalments, see under s. 51, *post*, p. 281.

(p) *Hochster v. De la Tour* (1853), 2 E. & B. 678; 22 L. J. Q. B. 455; *Cort v. Ambergate Ry. Co.* (1851), 17 Q. B. 127; 20 L. J. Q. B. 460; *Frost v. Knight* (1872), L. R. 7 Ex. 111.

(q) *Frost v. Knight*, *supra*.

(r) Following *Boorman v. Nash* (1829), 9 B. & C. 145.

S. 50 (3). complete his contract. *Cort v. Ambergate Ry. Co.* (1851), 17 Q. B. 127; 20 L. J. Q. B. 460.

Duty of seller or buyer to mitigate damages.

It seems that the damages may sometimes be mitigated where the seller, or the buyer, under s. 51, having accepted the repudiation, has had an opportunity of lessening the effect of the breach (*t*). The extent, however, of the seller's obligation is uncertain. It has been decided that he is not bound to go into the market and make a fresh contract (*u*); but he is bound, it would seem, to act as a reasonable man in the ordinary course of business (*x*).

Of course, when there is no difference between the contract price and the market price, or when the difference is in favour of the plaintiff, he can recover nominal damages only (*y*).

Measure of damages when there is no available market.

In default of a market, the loss incurred by the seller must be ascertained from other evidence. It may be determined in some cases by the price at which the goods have been resold within a reasonable time, and under reasonable circumstances, by the seller to a third person (*z*); and where there is no market price, *semble*, that the whole price under the contract may be recovered as evidence of value, the proper measure of damages being the *full amount of the damage* which the seller, acting as a reasonable man in the ordinary course of business, has *really* sustained by the buyer's breach of contract (*a*).

As the rules relating to damages are the same in an action by the buyer against the seller for non-delivery under s. 51, as in an action by the seller against the buyer for non-acceptance under this section, it will be convenient to include them in the notes under that section.

At the . . . times fixed.—See, for goods deliverable by instalments, under s. 51, *post*, p. 281.

Postponement of the time fixed for acceptance.—See under s. 51, *post*, pp. 281 *et seq.*, and the cases there cited in illustration.

For fuller information upon the subject of this section, the

(*t*) Per Cockburn, C.J., in *Frost v. Knight* (1872), L. R. 7 Ex. at p. 116; *Roper v. Johnson* (1873), L. R. 8 C. P. 167.

(*u*) *Brown v. Muller* (1872), L. R. 7 Ex. at p. 322, per Kelly, C.B.; *Roper v. Johnson*, *supra*, at p. 182, per Brett, J.

(*z*) *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. at p. 25, per James, L.J.; *Wilson v. Hicks* (1867), 26 L.

J. Ex. 242; see Mayne on Damages (ed. 1894), p. 174.

(*y*) *Valpy v. Oakeley* (1851), 16 Q. B. 941, followed in *Griffiths v. Perry* (1859), 1 E. & E. 680; 28 L. J. Q. B. 204.

(*x*) *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. at p. 24.

(*a*) *Dunkirk Colliery Co. v. Lever*, *supra*, at p. 25.

reader is referred to Mayne's Treatise on Damages (ed. 1894), pp. 170 *et seq.* S. 50 (3).

Remedies of the Buyer.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Under this section the buyer can maintain an action for damages for non-delivery, whether the property in the goods has or has not passed to him; in the former case, he has a further remedy in trover (see *post*, p. 284), and also for specific performance under s. 52; in the latter case, it is his only remedy (b); "he may recover damages for the breach, but has no special remedy growing out of the relations of seller and buyer" (c). S. 51 (1).

The seller wrongfully neglects or refuses to deliver.—As to the duty of the seller to deliver, see Part III. of the Act, *ante*, pp. 173 *et seq.*

Where the goods are deliverable to the buyer "on request," it is "a condition precedent to the buyer's right of action that he should make this request either personally or by letter, unless there has been a waiver [under s. 11 (3), *supra*] of compliance with this condition, resulting from the seller's having incapacitated himself from complying with the request by consuming, Goods deliverable "on request."

(b) Unless the seller is estopped from denying that the property has passed: *Woodley v. Coventry* (1863), 2 H. & C. 164; 32 L. J. Ex. 185.
(c) *Benj.* p. 906.

S. 51 (1). or re-selling, or otherwise so disposing of the goods as to render a request idle and useless" (d).

S. 51 (2). The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.—This is the first part of the rule as laid down in *Hadley v. Baxendale* (e) in 1854: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, *either* as arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The rule in
Hadley v.
Baxendale.

The first branch is dealt with in sub-s. 2 as a general rule, and its special application to cases where there is a market is stated in sub-s. 3. Both sub-sections are concerned with cases where there are no special circumstances known to both parties, and where in consequence the party breaking the contract "at the most, could only be supposed to have had in his contemplation the amount of injury which would arise *generally*, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract" (f).

The second branch forms the second rule in *Hadley v. Baxendale*, and deals only with damages under special circumstances. This is contained in s. 54 under the words "special damages."

Both the rules contained in these two sections are illustrations of the general principle that the buyer "is entitled to have in his hands, on the day fixed for delivery, goods which at that date have a certain value; . . . the value on that day is what the contract gives him" (g). And as the best evidence of what a thing is worth is its market price, we arrive at the special rule in sub-s. 3. But if the latter rule is inapplicable by reason of the absence of a market, the value must be otherwise ascertained.

Seller's delay
in delivery.

Delay in delivery.—When the seller's breach consists in *delaying* delivery, the rule is as stated by Willes, J., in *Borries v. Hutchinson* (h), *viz.*, the damages are the difference between the value of the goods at the time when delivery was due and their

(d) Benj. p. 925, see also p. 547.

(e) 9 Ex. 341, 354; 23 L. J. Ex. 179, 182. The rule is fully considered in *Mayne on Damages* (ed. 1894), pp. 11 *et seq.*

(f) Per Cur. in *Hadley v. Baxendale*, *supra*.

(g) Blackb. p. 512.

(h) (1865), 18 C. B. N. S. 445.

value at the time when they were actually delivered. This rule may be considered a special application of that in sub-s. 2. S. 51 (2).

ILLUSTRATIONS.

1. A. agrees to sell and deliver to B. by a certain date a floating boom derrick, the obvious and usual use of which was as a coal store. A. makes six months' delay in delivery, during which time the article might have been profitably employed as a coal store, and 420*l.* earned. B. is entitled to recover from A. the 420*l.*, that being the direct and natural loss caused by A.'s breach. *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181.

2. A. agrees to make and sell to B. by a certain date a firebox for an engine, which (not to A.'s knowledge) B. is under contract to repair for C. A. makes default in delivery, and B. has to buy elsewhere at a greater price, and has also to compensate C. for delay. B. may recover from A. the extra expense he has incurred, but not the damages paid to C., as these do not directly and naturally result from A.'s breach under the circumstances. *Portman v. Middleton* (1858), 4 C. B. N. S. 322.

Where there is an available market.—There must be some particular place where the buyer can buy other goods of the kind contracted for (i). "When a contract to deliver goods at a certain place is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy" (k). Numerous instances of the application of this rule are to be found among the reported cases (l). S. 51 (3).

The test is only a *prima facie* one, because it is subject to the saving contained in s. 54 as to special damages, and also to the provisions of s. 55.

ILLUSTRATIONS.

1. A. agrees to sell to B. a quantity of cotton at 16½*d.* a pound, deliverable on August 31st, and fails to deliver. B. re-sells for 19½*d.* a pound. The price on the 31st was 18½*d.* a pound. B. can recover from A. the difference between 16½*d.* and 18½*d.* a pound. *Williams v. Reynolds* (1865), 6 B. & S. 495.

2. A. agrees to sell and deliver to B. by December 31st a quantity of tallow at 65*s.* a hundredweight. On October 1st A. informs B. that he does not intend to carry out his contract as he has sold the goods to C. The market price of tallow was then 71*s.* a hundredweight, and, on December 31st, 81*s.* a hundredweight. B. may recover from A. the difference between 65*s.* and 81*s.* a hundredweight, and not that between

(i) For the definition of a market, see per James, L.J., in *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. at p. 25.

(k) Per Tindal, C.J., in *Barrow v. Arnaud* (1846), 8 Q. B. at p. 609.

(l) E.g., *Boorman v. Nash* (1829), 9 B. & C. 145; *Leigh v. Paterson* (1818), 8 Taunt. 540; *Falpy v. Oakley* (1851), 16 Q. B. 941, and cases cited in Benj. p. 907, note (a), and ante, p. 275.

- S. 51 (3). 65s. and 71s., as B. was not bound to agree to A.'s repudiation of the contract. *Leigh v. Paterson* (1818), 8 Taunt. 540.

Where the contract was in writing, parol evidence was held inadmissible to show, with a view to increasing the damages, that the contract price had been fixed above the market value, in consideration of the seller's making speedy delivery (*m*).

Measure of damages when there is no available market.

If there is no available market, and consequently no market price as a test of value, the value of the goods to the buyer at the date of the seller's breach must be ascertained by other evidence.

For this purpose evidence is admissible:—

- (i) of the price at the nearest market (*n*);
- (ii) of the price which the buyer, acting reasonably in that behalf, may have to pay for the best procurable substitute for the goods;

ILLUSTRATION.

A. agrees to sell to B. 2,000 shirtings deliverable by a certain date, but before that date says he cannot deliver in time, whereby B. is compelled (there being no market for those particular descriptions of shirting) to buy shirtings at an excess in price of 137*l.* 10*s.*, these being the nearest substitute procurable at the time, but being worth 87*l.* 10*s.* more than those contracted for. B. may recover from A. 137*l.* 10*s.*, and not only the difference between that sum and 87*l.* 10*s.* *Hinch v. Liddell* (1875), L. R. 10 Q. B. 265.

- (iii) where the goods are bought for the purpose of re-sale, of the price at which the buyer has contracted to re-sell them to a third person, within reasonable time and under reasonable circumstances (*o*).

In *Stroud v. Austin* (quoted in note), a re-sale immediately after the contract was held relevant evidence of value two months afterwards, the seller showing no variance.

Evidence of price on re-sale admissible as test of value.

It is important here to distinguish clearly between the buyer's right to put the re-sale price, i.e., his loss of profit, in evidence as a test of the real value of the goods, and his right to claim

(*m*) *Brady v. Oastler* (1864), 3 H. & C. 112; 33 L. J. Ex. 300 (diss. Martin, B.).

(*n*) 1 Sedgw. on D. p. 557, quoting *Rice v. Manley*, 66 N. Y. 82. See also per Cur. in *Durat v. Denton*, 47 N. Y. 167.

(*o*) *Peterson v. Ayre* (1853), 13 C. B. 353, per Maule, J.; *Borries v. Hutchinson* (1865), 18 C. B. N. S. 445;

Grébert-Borgnis v. Nugent (1885), 15 Q. B. D. at p. 89, per Brett, M.R.; *Stroud v. Austin* (1883), Cab. & Ell. 119. The objection has been raised by a learned American writer that the re-sale price is evidence not of the real value of the goods, but of the opinion of the parties as to their value, and, therefore, inadmissible.

S. 51 (3).

from the seller the loss of profits, *as such*, on a re-sale. "Where there has been a failure to deliver goods which are not procurable in the market, and they have been re-sold by the purchaser previous to breach of contract, it often seems as if the question of liability to pay for profits would arise for discussion. In reality, however, the re-sale is an immaterial circumstance, except so far as it may go to prove what the real value was at the time of breach. Where the re-sale took place in the ordinary course of commerce, it would be reasonable to accept it as a test of the then value of the article. But where it was a special transaction, in which a special price was given, in consequence of the peculiar exigencies of the purchaser, no such inference could be drawn. Therefore, notice of the re-sale would in the former case be unnecessary, in the latter probably be useless" (p). But, as will be seen under s. 54, the loss of profits *as such* may in some cases be claimed *as special damages* under that section.

- (iv) where the goods are bought for the purpose of use, and not of re-sale, of "the use for which [the article] was intended, the loss which followed from its not being supplied, and the profit which would have been made out of it if it had been delivered in time" (q). If the use intended be an ordinary one, so that the loss claimed result directly and naturally from the seller's breach of contract, the buyer can recover damages in respect thereof. But many of these cases, especially where profits are involved, are complicated by questions of special damage, involving questions as to notice and acquiescence, as to which see notes to s. 54, *post*, p. 291, and Mayne on Damages (ed. 1894), pp. 30 *et seq.*

As to the buyer's duty to mitigate the damages, when possible, see *ante*, p. 276. The buyer's only obligation in this respect, it seems, is to act as a reasonable man in the ordinary course of his business.

At the time or times when they ought to have been delivered. —When under the contract the goods are deliverable by instalments, the time of delivery of each instalment is, in the case of breach by either seller or buyer (r), treated, for the purpose of estimating damages, as a separate date of performance, so that the contract is, in effect, a series of distinct contracts.

Mode of assessing damages when goods are deliverable by instalments.

(p) Mayne on Damages (ed. 1894), p. 183.

(q) *Ibid.*

(r) *Ante*, s. 50 (3).

S. 51 (3).

ILLUSTRATIONS.

1. A. agrees to sell to B. 500 tons of iron, deliverable by three instalments during three successive months. Before the time of delivery of the first instalment A. repudiates the contract, but B. sues him at the end of the three months. The difference between the contract and the market price of the iron at the end of the third month is 237*l.* 10*s.*; the sum of the differences in the prices of each instalment, calculated at the end of each month, is 109*l.* 4*s.* B. can recover 109*l.* 4*s.* *Brown v. Muller* (1872), L. R. 7 Ex. 319.

2. A. agrees to sell to B. 3,000 tons of coal, deliverable by instalments from May to August. In May A. repudiates the contract, which B. in June accepts, and B. sues in July. B. may recover the sum of the differences between the contract and the market prices, calculated or estimated at the several periods for delivery, unless A. can show that B. could have obtained similar goods elsewhere in the meantime. *Roper v. Johnstone* (1873), L. R. 8 C. P. 167 (s).

It will be observed that the buyer in *Brown v. Muller* delayed bringing his action until after the time fixed for the last delivery, while in *Roper v. Johnstone* action was brought after a partial breach, but before the time fixed for the last delivery. The buyer (and the same rule applies to the seller under s. 50, see *ante*, p. 275) may elect which course to pursue (t), but in either case the damages will be assessed on the same principle, viz., with reference to the several periods fixed for delivery, and if the last period for delivery has not arrived when the action is tried, the jury must estimate prospectively the probable difference in respect of the future deliveries.

As to the right of the seller or buyer to treat the contract as rescinded on failure to accept or deliver one or more instalments, see s. 31 (2), and notes, *ante*, p. 195.

Measure of
damages
when delivery
is postponed,

Postponement of the time of delivery.—The effect of a postponement of the time fixed for the performance of the contract, by agreement between the parties or by the forbearance of one party at the request of the other, is to postpone the time of the breach, and consequently the time with reference to which the damages are to be calculated.

(1) to a specified date;

When the time of delivery has been postponed to a *specified* date at the seller's request (u), and the seller afterwards fails to deliver, the measure of damages will be the difference between

(s) And see *Ex parte Llansamlet Tin Plate Co.* (1873), 16 Eq. 155; *Barningham v. Smith* (1874), 31 L. T. N. S. 540, where damages were assessed on the same principle.

(t) The doctrine established by *Hochster v. De la Tour* (1853), 2 E. & B. 678; and *Frost v. Knight* (1872), L. R. 7 Ex. 111.

(u) It seems to be immaterial that the postponement has taken place at the *buyer's* request, and for his benefit, provided that the seller has acquiesced therein. See per Martin, B., in *Tyers v. Rosedale Iron Co.* (1875), 8 Ex. at p. 318, and per Cur. (in Ex. Ch.) 10 Ex. 195.

the contract and the market price at the postponed date. If the postponement is *indefinite* as to time, the damages must be assessed according to the market price (1) at the date when the buyer calls upon the seller to deliver, or (2) at a reasonable time after the last request for postponement made by the seller. The same rule applies when the postponement takes place at the buyer's request, and the buyer afterwards fails to accept.

S. 51 (3).

(2) indefinitely.

ILLUSTRATIONS.

1. A. agrees to sell to B. 500 tons of iron, deliverable by a certain date. A. requests B. to allow a postponement of delivery, and B. acquiesces. After a time, A. being still unable to deliver, B. goes into the market and buys in other iron. The price of iron has risen in the market during the delay. B. may recover from A. the difference between the contract and the market price at the postponed date. *Ogle v. Earl Vane* (1868), L. R. 3 Q. B. 272.

2. A. agrees to sell to B. a quantity of iron, deliverable during a particular month. B. makes several requests to A. to allow a postponement of delivery, to which A. assents. A. may recover the difference between the contract and the market price of the iron, calculated at a reasonable time after B.'s last request for postponement. *Hickman v. Haynes* (1875), L. R. 10 C. P. 598 (x).

When under the contract delivery is to be made by instalments, and postponement of delivery of one or more instalments takes place at the request of either party, difficulty will arise in calculating the damages unless the agreement for postponement specially provides either for the accumulation of the instalments or for the continuance of deliveries at the same intervals beyond the date originally fixed by the contract. *Tyers v. Rosedale Iron Co.* (y) is an illustration of this; but it was not necessary to decide the point in that case, because the plaintiff, having assessed the damages according to the price at the date of the refusal to deliver, and the market being a rising one, that date was advantageous to the defendant.

Then at the time of the refusal to deliver.—“When there is no time fixed, damages will be calculated from the period at which the defendant refuses to perform it (the contract). Such a refusal leaves no further *locus penitentiae* to himself, and of course the defendant cannot treat the agreement as any longer subsisting. Therefore, where in such a case the defendant sold the goods to a third party, the measure of damages was held to be the difference between the contract price and the price at which they were sold” (z).

(x) This case is one of non-acceptance under s. 50, but see the note to that section, *ante*, p. 276. See also *Ex parte Llansamlet Tin Plate Co.* (1873), 16 Eq. 155; and cf. *Tyers v. Rosedale Iron Co.* (1875),

L. R. 10 Ex. 195.

(y) *Ubi supra*.

(z) *Mayne on Damages* (ed. 1894), p. 179, quoting *Greaves v. Ashlin* (1813), 3 Camp. 426.

S. 51 (3).

Buyer's
remedy in
trover.

When the property in the goods has passed to the buyer under the contract, and the seller has tortiously re-sold the goods, the buyer may maintain an action of trover. But the measure of damages will be the same as if he sued on the contract, viz., the actual damage sustained, and not the value of the goods converted without deducting the price (a). "A man cannot merely by changing his form of action vary the amount of damage so as to recover more than the amount to which he is in law really entitled according to the true facts of the case and the real nature of the transaction" (b).

Previous to this Act the law of Scotland differed from the law of England as to the buyer's right to recover, as damages, his loss of profits on a re-sale. According to the Scotch law, the buyer might recover not only the difference between the contract and the market price of the goods, but in addition the amount of profit which he would have made by a contract of re-sale. It was on this ground that the House of Lords decided *Dunlop v. Higgins* in 1848 (c).

The effect of the Act, which applies to Scotland, is to overrule the decision in *Dunlop v. Higgins*, and the English rule will henceforward prevail in Scotland.

Specific per-
formance.

52. In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

(a) *Chinery v. Viall* (1860), 5 H. & N. 288; 29 L. J. Ex. 180.

(b) Per Cur. in *Chinery v. Viall*, *supra*, 29 L. J. Ex. at p. 184.

(c) 1 H. L. C. 381, where Lord Cottenham severely criticised the English rule.

Contract to deliver.—The words “for a price in money,” contained in 19 & 20 Vict. c. 97, s. 2 (repealed by this Act), are here omitted. But the subsequent words, “payment of the price,” show conclusively that the section contemplates only the case of a sale, apart from the fact that the Act does not apply to any other transaction.

S. 52.

Specific or ascertained.—The words in the original Act were “specific goods.” See on this, the notes to s. 17, *ante*, p. 115.

This section reproduces, with modifications due to the Judicature Acts and Orders, s. 2, now repealed, of 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856). Formerly, at common law, the buyer had no remedy except in an action for damages. In equity, however, the Courts, in cases where damages were not a sufficient compensation, as, *e.g.*, where the sale was of articles of unusual beauty or rarity (*d*), decreed that the seller should deliver up the specific chattels sold. The cases in equity on the subject are collected in White & Tudor’s Leading Cases in Equity (*e*), where the rule, as deduced from the authorities, is stated. The same remedy was provided at law by the Mercantile Law Amendment Act, s. 2, above referred to; and now under s. 24 of the Judicature Act, 1873, every Court can grant equitable relief.

The plaintiff.—Under s. 62 (1), this term includes a defendant counter-claiming.

Under Ord. XLVIII. r. 1 of the Rules of the Supreme Court, which substantially reproduces s. 78 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), provision is made for the recovery of chattels by a writ of delivery. The effect of the rule, it seems, is only to give a right of distress until delivery, and a writ of assistance is still necessary for the actual delivery of a specific chattel (*f*).

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer

Remedy for
breach of
warranty.

(*d*) See per Kindersley, V.-C., in *Falcke v. Grey* (1859), 4 Drew. at p. 658; 29 L. J. Ch. 28.

(*e*) Vol. I. p. 912 (ed. 1888) notes to *Cuddes v. Rutler*; Benj. p. 932. It is to be noted that the Act has no saving clause as to the rules of Equity: cf. s. 61 (2).

(*f*) See *Wyman v. Knight* (1888), 39 Ch. D. 165, *q. v.* for the form of order. Judgment in an action of detinue provides primarily for the return of the specific chattel, *Eberle’s Hotel Co. v. Jonas* (1887), 18 Q. B. D. 459 (C. A.).

S. 53 (1). is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

S. 53 (1). Warranty (except as regards Scotland) is defined in s. 62 (1), to be "an agreement with reference to goods which are the subject of a contract of sale, but *collateral* to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

As to the distinction between a condition and a warranty, and the right of the buyer to reject the goods on breach of the former, see s. 11, *ante*, pp. 68—70.

Where the buyer elects, or is compelled.—The buyer may elect under s. 11 (1) (a), or be compelled under s. 11 (1) (c). In the case of an agreement to sell under s. 1 (3), when the seller's "warranty" is in fact a condition, the buyer may elect either to treat the breach of "warranty," so-called, as a breach of condition, and refuse to accept the goods (*g*); or he may accept the goods and sue the seller under this section for breach of the warranty arising *ex post facto*.

In the case of a sale of specific goods, accompanied by a true warranty, the buyer cannot, under s. 11 (1) (c), in the absence of fraud on the seller's part (*h*), refuse to accept the goods, unless the warranty was expressly intended to operate as a condition (*i*); his only remedy is an action under this section for damages for breach of warranty.

So, also, by acceptance of part or all of the goods under a non-severable contract, the buyer is compelled, as shown by

(*g*) The dicta of the judges in *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447, are to the effect that in an agreement to sell *specific* goods a warranty does not amount to a condition; but see the discussion of the case in Benj. p. 936.

(*h*) *Street v. Blay* (1831), 2 B. & Ad. 456; *Gomperts v. Denton* (1832), 1 C. & M. 207.

(*i*) *Bannerman v. White* (1861), 10 C. B. N. S. 844; *Head v. Tattersall* (1871), L. R. 7 Ex. 7 (return of a horse). The return of the goods may, by agreement, be the buyer's only remedy, and he cannot retain them and sue on the breach of warranty. *Hinchcliffe v. Barwick* (1880), 5 Ex. D. 177.

s. 11 (1) (c), to treat any breach of a condition as a breach of warranty (*k*). S. 53 (1).

The rule in clause (a) is an illustration of the principle first established definitely in *Basten v. Butter* (*l*), that payment shall be commensurate with the benefit received.

The remedies are alternative. The buyer, when sued for the price, is not bound to set up the defective quality of the goods; he may pay the whole price and then sue for damages for breach of contract (*m*). And sub-s. 4 to this section further shows that the buyer, having used the remedies given him in clause (a), may seek compensation for further damage for the same breach.

The effect of the Judicature Acts is to substitute a counter-claim for the buyer's old remedy by cross-action.

Under Ord. XIX., r. 3, the buyer may set off, or set up by way of counter-claim, "any right or claim," whether sounding in damages or not, and by way of cross-action, against the claim of the seller. And further, under Ord. XXI., r. 17, the buyer is enabled to recover consequential damages which may possibly far exceed the amount of the price sued for by the seller (*n*).

As regards *procedure*, the buyer may either—

(1.) Under clause 1 (a), *in defence* set up the defective quality of the goods "in diminution (*o*) or extinction (*p*) of the price" sued for; or S. 53 (1) (a).

(2.) Under clause 1 (b), maintain an action (including, under s. 62 (1), a counter-claim) (*q*) to recover special or consequential damages, notwithstanding (see clause 4) the previous diminution or extinction of the price. S. 53 (1) (b).

Previous to the Judicature Acts, the buyer's right to insist on a reduction of the price on the ground of breach of warranty could not be made available if he had given a negotiable security for the price, and the action was brought on the security. The reason was that the law did not permit an unliquidated and uncertain claim to be set up in defence against the liquidated

(*k*) Benj. p. 946.

(*l*) (1806), 7 East, 479. See notes to *Cutter v. Powell*, 2 Sm. L. C. (9th ed.) 1.

(*m*) *Davis v. Hedges* (1871), L. R. 6 Q. B. 687.

(*n*) The usual course, it seems, is to plead the diminution in value by way of defence *pro tanto*, with a counter-claim for the special damage: *Bullen & Leake, Precs. of Pleading*

(ed. 1888), Part II. p. 304.

(*o*) *Mondel v. Steel* (1841), 8 M. & W. 858, the leading case before the Judicature Acts.

(*p*) *Poullton v. Lattimore* (1829), 9 B. & C. 259.

(*q*) Defined as "in the nature of a proceeding in a cross-action," per Bowen, L.J., in *Amon v. Bobbett* (1889), 22 Q. B. D. at p. 548.

S. 53 (1). demand represented by a bill or note (o). Since the Judicature Acts, the buyer is allowed such a set-off or counter-claim as is shown above, and even before the Judicature Acts the buyer could, in an action on a bill or note, show a *total* failure of consideration (p).

ILLUSTRATIONS.

1. A. agrees to sell B. a quantity of seed, warranted to be good new growing seed, which B. sows. It proves wholly unproductive. In A.'s action for the price B. may successfully defend himself against the whole of A.'s claim by showing that the seed was worthless. *Poulton v. Lattimore* (1829), 9 B. & C. 259.

2. A. sells to B. for twelve guineas a horse warranted sound, of which B. pays three guineas. The horse is unsound, and in fact worth only a guinea and a-half. B. may show, in A.'s action for the balance of the price, that he has been overpaid. *King v. Boston* (1789), 7 East, at p. 481, note (a).

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

S. 53 (2), (3). In relation to the measure of damages which the buyer is entitled to recover for breach of warranty, the rules are substantially the same as those which are given in the case of the seller's breach of his obligation to deliver under s. 51.

These two sub-sections embody (as was shown under s. 51, *ante*, p. 278) the first part of the rule in *Hadley v. Baxendale*, sub-s. 3 being the particular application of it.

Primâ facie.—*I. e.*, subject to ss. 54 and 55.

In order to estimate what the real value of the goods as warranted would have been, the price obtained by the buyer on a re-sale before the breach of warranty has been discovered may be put in evidence, but the difference between the contract

(o) See the exposition of the law, p. 946.

and citation of authorities, in Byles
on Bills (ed. 1886), p. 151; Benj.

(p) *Wells v. Hopkins* (1839), 5 M.
& W. 7.

price, and the price on the re-sale cannot be claimed as specific damage (q). S. 53 (2), (3).

The measure of damages may be largely increased when the goods are bought for a particular purpose known to the seller. In this case special circumstances are involved. See on this the notes to s. 54, *post*, pp. 292, 293.

ILLUSTRATIONS.

1. B. buys of A., a coachbuilder, a pole for his carriage. The pole, being defective, breaks, in consequence of which B.'s horses and carriage are damaged. The value of the pole is 3*l.*, and the amount of the damages to the horses and carriage is 130*l.* B. may recover 133*l.* from A., if the jury find that the damages are the natural consequence of the defect in the pole. *Randall v. Newson* (1876), 2 Q. B. D. 102.

2. B. buys of A. seed barley, of which A. warrants the quality. A. delivers inferior barley. The difference between the value of the seed sold and of the seed as warranted is 15*l.* B. may recover from A. 15*l.* *Randall v. Raper* (1858), E. B. & E. 84; 27 L. J. Q. B. 266.

3. B. agrees to buy of A. a quantity of Manilla hemp. On arrival the hemp is found to be damaged and unmerchantable. B. sells it, and realizes, by reason of a rise in the market, 75 per cent. of the market price of undamaged hemp. B. may recover from A. in an action for breach of warranty, the 25 per cent. difference. *Jones v. Just* (1868), L. R. 3 Q. B. 197 (r).

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

This rule is in accordance with that passage in the judgment in *Mondel v. Steel* (s), where Parke, B. says (t): "*To the extent that [the buyer] obtains, or is capable of obtaining, an abatement of price . . . he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.*" S. 53 (4).

ILLUSTRATION.

B. agrees to buy of A. a ship to be built according to certain specifications. A. builds the ship in an unworkmanlike manner. B., in an action by A. for the agreed price, obtains an abatement, by

(q) *Clare v. Maynard* (1837), 6 A. & E. 619; *Cox v. Walker* (1835), *ibid.* 523, n.; *Mayne on Damages* (ed. 1894), p. 192.

(r) See also *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797.

(s) (1841), 8 M. & W. 858.

(t) *Ibid.* at p. 872.

S. 53 (4). reason of the defective workmanship. The ship afterwards becomes strained, and has to be repaired. B. may recover the cost thereof from A., such subsequent damage not being covered by the abatement in price. *Mondel v. Steel* (1841), 8 M. & W. 858 (t).

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

See on this, ss. 11 (2) and 35.

Interest and special damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

S. 54.
Right to re-
cover interest,
(1) at common
law;

Interest.—At common law, the creditor, as a general rule, is not entitled to interest. "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances" (u).

There is no implied promise to pay interest on a sale of goods *simpliciter*, and it makes no difference that the sale is on credit, or that a particular date is fixed for payment (x). But a contract to pay interest on the price will be implied when the goods are to be paid for by bill, which is not given, and from the date when the bill would have matured (y).

(2) by statute.

By statute the creditor may, in certain circumstances, and at the discretion of the jury, recover interest by way of damages for the wrongful detention of the money (z).

3 & 4 Will. 4, c. 42, s. 28, enacts, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on

(t) And see *Street v. Blay* (1831), 2 B. & Ad. 456; *Allen v. Cameron* (1833), 1 C. & M. 832; *Davis v. Hedges* (1871), L. R. 6 Q. B. 687.

(u) *Higgins v. Sargent* (1823), 2 B. & C. 348, per Abbott, C.J.

(x) *Gordon v. Swan* (1810), 2 Camp. 429; 12 East, 419; *Calton v. Bragg* (1812), 15 East, 223.

(y) *Marshall v. Poole* (1810), 13 East, 98; *Farr v. Ward* (1837), 3 M. & W. 25.

(z) See *Webster v. British Empire Assurance Co.* (1880), 15 Ch. D. 169, and the dictum of Thesiger, L.J. (at p. 178), that the statute is merely declaratory of the common law.

the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the term of payment: Provided that interest shall be payable in all cases in which it is now payable by law" (a).

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Special damages.—These words embody the second branch of the rule in *Hadley v. Bazendale*, quoted *supra*, under s. 51, *ante*, p. 278. Special damages are such as, under ordinary circumstances, would not be the natural and ordinary consequences of the breach of contract. They arise from special circumstances connected with the particular contract, and may be recovered if they are "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Right to recover special damages.

The judgment in *Hadley v. Bazendale* proceeds as follows:—"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The above extract was stated by Lord Esher, M.R., in *Hammond v. Bussey* (b), "as rather a valuable exemplification of the rule—an illustration of the circumstances under which the second branch of the rule would apply—than as part of the rule itself."

The special circumstances must not only be communicated to the party sought to be charged, but he must have assented to be responsible for the consequences flowing from them (c). But knowledge of the special circumstances would, in ordinary cases, amount to such an assent as, when the real situation of the parties is disclosed to the party to be charged, there may be "a

(a) For cases decided under the statute, see *Duncombe v. Brighton Club Co.* (1875), L. R. 10 Q. B. 371; 44 L. J. Q. B. 216; *Geake v. Ross* (1875), 44 L. J. C. P. 315; and, generally, on the question of interest, *Mayne on Damages* (ed. 1894),

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(b) (1887), 20 Q. B. D. at p. 88.

(c) Per Willes, J., in *British Columbia Saw Mills Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Mayne on Damages* (ed. 1894), pp. 30—41.

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fair inference of fact that [special] damages were intended to be recouped if they were suffered" (e).

The principles of law relating to special damages are in no way peculiar to contracts of sale, and therefore fall outside the scope of this treatise. Some leading cases illustrative of contracts of sale, together with their salient points, are included in the note, *infra* (f); and for fuller information on the subject the reader is referred to Mayne on Damages (ed. 1894), by the Author and Judge Lumley Smith.

It may, however, be useful to mention here certain special rules under this head relating to contracts of sale.

Goods ordered
for particular
purpose.

Upon the non-delivery by the seller of an article which was to his knowledge ordered for a particular purpose, the buyer may, where there is no market for similar articles, recover the value of the profits which he would have made by the application of the article to such purpose (g); or, if the seller was aware of no particular purpose, the amount of the loss, not exceeding the value of the profits which the buyer would have gained by the application of the article to any purpose to which it was, to the knowledge of the seller, capable of being ordinarily applied (h).

When the purpose for which the goods were bought is the fulfilling by the buyer of a sub-contract of sale, the damages, where there is no market, include, in addition to loss of profit, a reasonable indemnity against the buyer's liability to the sub-buyer (i). But the buyer cannot recover, as such, any particular

(e) Per Bowen, L.J., in *Grebert Borgnis v. Nugent* (1885), 15 Q. B. D. at p. 93.

(f) *Fletcher v. Tayleur* (1855), 17 C. B. 21; 25 L. J. C. P. 65 (sale of a ship—late delivery—special damage recovered: loss of freights); *Portman v. Middleton* (1868), 4 C. B. N. S. 322; 27 L. J. C. P. 231 (sale of a fire-box—late delivery—special damage not known to seller and not recoverable—Illustration, *ante*, p. 279); *Smeed v. Ford* (1859), 1 E. & E. 602; 28 L. J. Q. B. 178 (sale of a threshing machine—late delivery—special damage recovered: injury to crops); *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181 (sale of a derrick—late delivery—special purpose not communicated to seller—Illustration, *post*, p. 295); *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670 (sale of an

essential part of a machine—late delivery—special damage recovered: expenditure incurred on machine, and loss of profits on sub-contract); *Hammond v. Bussey* (1887), 20 Q. B. D. 79 (sale of steam coal—breach of warranty—special damage recovered: costs of action reasonably defended by buyer—Illustration, *post*, p. 294).

(g) *Fletcher v. Tayleur* (1855), 17 C. B. 21; per Cairns, L.C., in *Ex parte Trent and Humber Co.* (1868), 4 Ch. Ap. at p. 117; *Hydraulic Engineering Co. v. McHaffie* (1879), 4 Q. B. D. 670.

(h) *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181; *De Mattos v. G. E. Steamship Co.* (1884), Cab. & Ell. 489.

(i) *Grebert Borgnis v. Nugent* (1885), 15 Q. B. D. 85. The knowledge of the seller may be by parol: *Sawdon v. Andrews* (1874), 30 L. T. N. S. 23.

damages or penalties provided for by the second contract, unless the seller was aware of the specific provision (*k*); but the amount of such damages or penalties is relevant to prove what is such a reasonable indemnity aforesaid (*k*).

Knowledge by the seller of a general intention in the buyer to resell is sufficient knowledge so as to entitle the buyer to recover the amount of his profits under a particular contract (*k*). *Thol v. Henderson* (*l*), on this point, seems to be overruled.

When the purpose for which the goods were ordered is the fulfilment of a sub-contract of sale, and the goods do not answer the contract, the damages include the damages and costs of an action against the buyer, which the latter has reasonably defended (*m*); and the fact that the inferiority of the goods could not be detected except by use after delivery to the sub-buyer is relevant to prove that the defence was reasonable (*m*).

Consideration . . . has failed.—When one party to a contract has paid money under the contract to the other party, and the consideration for which it was paid wholly fails, he may recover the money so paid, on the ground of failure of consideration, in an action for money had and received (*n*). This principle is applicable to every class of contract, and presents no peculiarity in relation to contracts of sale. The earliest case on the subject relating to a contract of sale was decided about a century ago, and the law has remained settled since that date (*o*). The buyer, who has paid the whole or part of the price in advance, may maintain an action for money had and received, when there has been a breach of some condition to be fulfilled by the seller, and the buyer has elected, under ss. 11—15, *ante*, to reject the goods and repudiate the contract.

Failure of consideration.

For example, the buyer may recover the price paid to a seller who has impliedly warranted his title to the goods sold under s. 12 (*l*), when the goods prove to be stolen goods, which the buyer is compelled to restore to the true owner (*p*). Or again, when there is a breach by the seller of the condition implied under s. 13, and the goods delivered differ in substance from

(*k*) Per Brett, M.R., in *Grebert Borgnis v. Nugent*, *supra*.

(*l*) (1881), 8 Q. B. D. 457.

(*m*) *Hammond v. Bussey*, *supra*; *sees*, when the inferiority can be detected before: *Wagstaff v. Short-horn Dairy Co.* (1884), Cab. & Ell. 324.

(*n*) Chitty on Contracts, pp. 87—92; Bullen & Leake, *Precedents of Pleading* (3rd ed.) p. 48, where all the cases are collected.

(*o*) *Giles v. Edwards* (1797), 7 T. R. 181.

(*p*) *Eichholz v. Banister* (1864), 17 C. B. N. S. 708.

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those which the buyer has contracted to accept and pay for (*q*). But the buyer will not succeed on the ground of failure of consideration if the goods delivered are those which he intended to buy, although they may turn out to be worthless (*r*).

The consideration must have *wholly* failed; but in some cases, when the contract is severable, an action will lie when a *part* of the consideration has wholly failed, *e.g.*, when a quantity of goods have been ordered at a certain rate of payment, and only a portion has been delivered, the buyer may recover a proportionate part of the price paid (*s*).

The action for money had and received lies when money has been paid by reason of a mistake of fact, *e.g.*, when an excess of price was paid on the sale of a bar of silver sold by weight, owing to an error of the assayer (*t*).

For fuller information on the subject of failure of consideration, the reader must be referred to the text-writers mentioned in the note, *infra* (*u*).

ILLUSTRATIONS [of special damages].

1. B. buys of A. a quantity of "steam coal" for the purpose, known to A., of reselling it, under the same description, for use in steamships. B. resells it to C. as coal of a similar description. The coal was not reasonably fit for use as "steam coal" on steamships, but this fact could only be detected by use. C., in an action on his warranty against B., recovers damages and costs. B. may recover from A. such damages and costs, if B. acted reasonably in defending C.'s action, as damages and costs would, under the circumstances above stated, be reasonably contemplated by the parties as the probable result of A.'s breach. *Hammond v. Bussey* (1887), 20 Q. B. D. 79.

2. B. buys of A. a cow which A. warrants to be free from foot-and-mouth disease. A. knows B. to be a farmer, and that the cow would probably be placed with a herd. B. places the cow, who was infected with the disease in question, with other cows, to whom she communicates the disease, and in consequence she and several of them die. The value of the cow sold is 8*l.*, and of the other cows 42*l.* B. may recover from A. (in addition to the 8*l.*) the 42*l.*, as special damages, as the death of the other cows was the probable result of A.'s breach. *Smith v. Green* (1875), 1 C. P. D. 92.

3. B. buys of A. a quantity of sheep skins for the purpose of fulfilling a sub-contract with C., of which he informs A. A. fails to deliver, and, there being no market for similar goods, B. cannot buy elsewhere, and loses a profit of 34*l.*, and also has to pay C. 28*l.* damages. B. can recover the 34*l.* from A., and also the 28*l.*, the

(*q*) Per Cur. in *Chapman v. Speller* (1850), 14 Q. B. 621; 19 L. J. Q. B. 241; *Gompertz v. Bartlett* (1853), 2 E. & B. 849; 23 L. J. Q. B. 65.

(*r*) *Lamert v. Heath* (1846), 15 M. & W. 486.

(*s*) *Devauz v. Conolly* (1849), 8 C. B. 640; cf. *Harnor v. Groves* (1855),

16 C. B. 667; 24 L. J. C. P. 53; Benj. p. 398.

(*t*) *Cox v. Prentice* (1815), 3 M. & S. 344.

(*u*) Benj. p. 396; Chitty on Contracts, pp. 87—93; Bullen & Leake (3rd ed.), p. 48.

latter appearing to be a reasonable indemnity to B. against his liability to C. *Grebert Borgnis v. Nugent* (1885), 15 Q. B. D. 85.

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4. A. agrees to sell to B. a floating boom derrick, which he supposes B. wants for the usual purpose of using it as a coal store, but which B. intends to use as a means of transshipping coals. A. delays delivery. B.'s loss of profit, had he intended the purpose supposed by A., would be 420*l.*; as a fact he incurs a greater loss. B. may recover 420*l.* from A. *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181.

5. A. agrees to make for B. by a certain time a particular part of a machine, called a "gun," the machine itself being deliverable by B., to A.'s knowledge, under a contract of sale with C. A. delays delivery to B., and C. rejects the machine, which is of value only as old iron. B. is entitled to recover from A. the loss of profit on his contract with C., the expenditure in making other parts of the machine, and the cost of painting it to preserve it. *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670.

ILLUSTRATIONS [of failure of consideration].

1. A., a job warehouseman, sells to B. a number of pieces of prints lying in A.'s warehouse. B. pays the price of the goods in advance. The goods had, in fact, been stolen, and B. is compelled to restore them to their owner. B. may recover from A. the price so paid, in an action for money had and received. *Eichholz v. Bannister* (1864), 17 C. B. N. S. 708.

2. A. sells to B. what purports to be a foreign bill of exchange. A. does not indorse the bill and the sale is without recourse. B. pays A. the price of the bill. The bill turns out to be worthless, because in fact a domestic bill, and therefore invalid without a stamp. At the time of the sale both A. and B. are ignorant of the defect. B. may recover the price of the bill from A. in an action for money had and received. *Gompertz v. Bartlett* (1853), 2 E. & B. 849.

3. A., a stockbroker, sells to B. scrip in the "Kentish Coast Railway Co." B. pays A. the price of the scrip. The scrip, not having been issued or authorized by the company, turns out to be worthless. B. cannot recover from A. the price, if the scrip sold is that which he intended to buy. *Lamert v. Heath* (1846), 15 M. & W. 486.

4. A. sells to B. two parcels of *terra japonica*, one of 25 tons, the other of 150 tons, at the rate of 18*s.* per cwt. On the faith of the invoices, B. accepts bills for the value of the whole quantities said to have been shipped. A., in fact, ships, and B. accepts, parcels of 24 tons and 132 tons respectively. B. may recover from A. the price paid for the deficient quantity. *Devaux v. Conolly* (1849), 8 C. B. 640.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

S. 55.

The effect of this section is to preserve intact the general principles and rules of construction applicable to contracts of sale. The implication of law as to the intention of the parties with regard to their contractual rights and obligations may be displaced by evidence of the terms of the contract agreed upon by the parties, either expressly, or by implication from a previous course of dealing between them, or the usage of trade. It is, in fact, competent to the parties to make whatever bargain they please—*modus et conventio vincunt legem*. The most important illustrations under this Act of rights and obligations created by implication of law are the implied conditions and warranties under ss. 12—15, and the rights of the unpaid seller under s. 39.

Express agreement.

By express agreement.—For the general application of the maxim *expressum facit cessare tacitum*, the reader must be referred to the notes collected under *Wigglesworth v. Dallison* in Smith's Leading Cases (9th ed.), Vol. I., p. 569; and to Broom's Legal Maxims (6th ed.), p. 606.

With regard to the effect of an express agreement on a right arising by implication of law, *e.g.*, lien, Lord Westbury says, in *Chambers v. Davidson* (x):—"Lien is given by implication of law. If, therefore, a mercantile transaction, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum*."

Any implied right or obligation will not, however, be displaced by an express agreement, where, upon the true construction of the contract, the express provision appears to have been super-added for the benefit of the buyer, as in the cases quoted in the note (y).

Course of dealing.

By the course of dealing—*i. e.*, the evidence of former transactions between the same parties (z).

Usage.

By usage.—The maxim is, *In contractis tacite insunt quæ sunt moris et consuetudinis*. "With respect to contracts commercial, it has been long established that evidence of a usage of trade applicable to the contract, and which the parties making it knew

(x) (1866), L. R. 1 P. C. 296, 305; 100, 105, respectively.
4 Moo. P. C. C. N. S. 158.

(y) Per Willes, J., in *Mody v. Gregson* (1868), L. R. 4 Ex. at p. 53; *Bigge v. Parkinson* (1862), 7 H. & N. 955; 31 L. J. Ex. 301. See notes to ss. 14 (4), and 15 (2) (c), *ante*, pp.

(z) See *Bourne v. Gatliff* (1844), 11 Cl. & Fin. 45; *Ford v. Yates* (1841), 2 M. & G. 549; *Cumming v. Shand* (1860), 5 H. & N. 95; 29 L. J. Ex. 129.

or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent" (a), the presumption being that "the parties did not mean to express in writing the whole of the contract, but a contract with reference to those known usages" (b). Evidence of trade usage is also admissible for the purpose not of incorporating new terms, but of explaining the terms used in the contract: "To supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used" (c).

The usage must be lawful, established by evidence, and consistent with the nature and terms of the contract. "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written or express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expression of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties" (d).

There is a distinction between an ordinary trade usage, which must be proved as a matter of fact until it is judicially recognized, and a trade usage which, having been judicially ascertained and established, becomes a part of the law merchant

(a) 1 Sm. L. C. (9th ed.) p. 58; notes to *Wigglesworth v. Dallison*.

(b) Per Parke, B., in *Hutton v. Warren* (1836), 1 M. & W. 475.

(c) Per Lord Cairns, in *Bovos v. Shand* (1877), 2 Ap. Ca. at p. 468.

(d) Per Story, J., in *The Schooner Reeside* (1837), 2 Sumner (U. S.), R. 567, 569.

S. 55. (preserved by s. 61 (2)), and is judicially taken notice of as a matter of law (e).

A few cases illustrating the interpretation of contracts of sale by reference to trade usage are collected in the note below (f).

If the usage be such as to bind both parties.—This clause embodies the rule laid down by the House of Lords in *Robinson v. Mollett* (g).

Reasonable
time a ques-
tion of fact.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

S. 56. See ss. 11 (2), 18 Rule 4 (b), 29 (2) (4), 35, 37, 48 (3).

Rights, &c.
enforceable
by action.

57. Where any right, duty, or liability, is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

S. 57. The object of this section seems to be, by providing a specific procedure for the enforcement of the rights created by the Act, to negative the possibility of procedure by way of indictment. *Quere*, as to the effect, if any, of this section upon the remedy against the sheriff under s. 26 (h).

Instances of liabilities under this Act are, e.g., the duty of the buyer under s. 37 to take delivery, and the duty of the carrier under s. 46 (2) to re-deliver to the seller; and probably also the duty of the sheriff to indorse the date of the writ under s. 26 (1). See the note under that section, *ante*, p. 173.

(e) Blackb. p. 80. See also per Lord Campbell, in *Brandao v. Barnett* (1843), 12 Cl. & F. at p. 805; and per Cockburn, C.J., in *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 346.

(f) Evidence of trade usage admitted (1) to incorporate new terms: *Jones v. Bowden* (1813), 4 Taunt. 847 (usage as to implied warranty); *Syers v. Jonas* (1843), 2 Ex. 111 (usage to sell by sample); *Humphrey v. Dale* (1857), E. B. & E. 1004; 26 L. J. Q. B. 137 (usage to make broker personally liable on contract); *Field v. Lelean* (1861), 6 H. & N. 617; 30 L. J. Ex. 168 (usage not to deliver

until payment); *Johnson v. Raylton* (1881), 7 Q. B. D. 438 (usage that goods supplied shall be the seller's own make): (2) to interpret the meaning of terms used: *Smith v. Wilson* (1832), 3 B. & Ad. 728 ("a thousand" of rabbits); *Spicer v. Cooper* (1841), 1 Q. B. 424 (pockets of Kent hops); *Gorriassen v. Perrin* (1857), 2 C. B. N. S. 681 ("bale"); *Bowes v. Shand* (1877), 2 Ap. Ca. 455 (where the methods and limits of such interpretation are considered).

(g) (1875), L. R. 7 H. L. 802.

(h) See Lely & Craies, "The Annotated Acts" [No. 2], p. 29.

58. In the case of a sale by auction—S. 58.
Auction sales.

- (1.) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale:
- (2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:
- (3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:
- (4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

A sale of goods by auction falls within the provisions of s. 4, which reproduces s. 17 (now repealed) of the Statute of Frauds. Lord Mansfield once expressed a doubt whether a sale by auction, owing to its publicity, was within the mischief contemplated by the Statute of Frauds⁽ⁱ⁾, but the doubt has long since been set at rest^(k).

S. 58.

The auctioneer is primarily the seller's agent^(l); but the buyer at a *public* auction^(m), by the act of bidding for the goods,

(i) In *Simon v. Motivos* (1766), 1 W. Bl. 599; *S. C.*, 3 Burr. 1921.

8 Ap. Ca. at p. 488, per Lord Blackburn.

(k) *Hinde v. Whitehouse* (1806), 7 East, 558, per Lord Ellenborough; *Kennworthy v. Schofield* (1824), 2 B. & C. 945; *Maddison v. Alderson* (1883),

(l) Benj. p. 247.

(m) Otherwise at a *private* sale, when the auctioneer is the seller's agent alone. *Mews v. Carr* (1856), 1

S. 58. is presumed to authorize the auctioneer to make and sign a memorandum of the sale on his behalf, after the goods have been knocked down, so as to bind him under s. 4 (*n*). The presumption, however, may be rebutted from the circumstances of the case (*o*). "The agency of the auctioneer for the buyer only begins when the contract is completed by knocking down the hammer. Up to that moment he is the agent of the seller exclusively. It is only when the bidder has become the buyer that the agency arises; and until then the buyer may retract (sub-s. 2, *infra*), and the auctioneer may do the same in behalf of the seller" (*p*).

Sometimes the auctioneer's clerk may be the buyer's agent (*q*), but ordinarily this is not the case (*r*).

S. 58 (1). Each lot is . . . the subject of a separate contract.—Sub-s. 1 embodies a rule which has been long established (*s*).

Primâ facie.—The rule applies only in the absence of a contrary intention. Thus the making by the parties of a written contract or memorandum embodying several sales is relevant to prove an intention that the whole transaction shall be one entire contract (*t*).

S. 58 (2). A sale by auction is complete.—Each bidding at a sale by auction is merely a proposal—not a conditional purchase. It may, therefore, be retracted before acceptance (*u*). The condition of sale ordinarily inserted for the purpose of negating the buyer's right to retract a bid, which was originally suggested to Lord St. Leonards by the case of *Payne v. Cave*, *infra*, is not, it seems, enforceable, unless the sale takes place under special circumstances (*x*).

S. 58 (3). Where a sale by auction is not notified, &c.—This will include the following cases:—

(1) A sale without any notification as to reserve;

H. & N. 484; Benj. p. 247. No distinction is made in s. 58 between public and private sales.

(*n*) Benj. p. 247.

(*o*) *Bartlett v. Purnell* (1836), 4 A. & E. 792.

(*p*) Benj. p. 247. The latter case is not provided for in s. 58.

(*q*) *Bird v. Boulter* (1833), 4 B. & Ad. 443.

(*r*) *Peirce v. Corf* (1874), L. R. 9 Q. B. 210, per Blackburn, J., at p. 216. See also *M'ullen v. Helberg* (1878), 4 L. R. Ir. 94, 105.

(*s*) *Emmerson v. Heelis* (1809), 2

Taunt. 38; *Rugg v. Minett* (1809), 11 East, 218; *Roots v. Dormer* (1832), 4 B. & Ad. 77; cf. *Couston v. Chapman* (1872), L. R. 2 Sc. Ap. 250.

(*t*) *Dykes v. Blake* (1838), 4 B. N. C. 463; *Bigg v. Whisking* (1853), 14 C. B. 195; *Balday v. Parker* (1823), 2 B. & C. 37.

(*u*) *Payne v. Cave* (1789), 3 T. R. 148, where the Court referred to an auction as *locus penitentiae*; *Warlow v. Harrison* (1858), 1 E. & E. 295.

(*x*) Sugden, V. & P. (4th ed.) p. 14; Dart, V. & P. (6th ed.) p. 139. See *Freer v. Rimmer* (1844), 14 Sim. 391.

- (2) A sale notified to be "without reserve";
- (3) A sale subject to a reserved price;
- (4) A sale as in (1), with a notification that the highest bidder shall be the purchaser.

S. 58 (3).

Sub-s. 3, taken in conjunction with sub-s. 4, requires an express notice of a reserved bidding, not, it should be noticed, of a reserved price. As to the effect of the latter, see on sub-s. 4, *infra*.

This is declaratory only of the rule which had been long established at common law (y).

By 30 & 31 Vict. c. 48 (the Sale of Land by Auctions Act, 1867; see Appendix of Statutes, *post*, p. 323), the rule in equity was conformed to the rule at law, but the statute is applicable only to sales by auction of *land*. This sub-section, with which s. 5 of 30 & 31 Vict. c. 48 should be compared, renders it clear, if there was any previous doubt on the point (z), that on a sale of goods by auction, in the absence of express stipulation reserving the right to do so, the employment by the seller of a person to bid on his behalf will render the sale fraudulent as against the buyer. The *secret* employment of a person to bid is the gist of the fraud.

Employ any person.—*i.e.*, as a puffer, who is defined as "a person appointed to bid on the part of the owner" (a). The rule is of course otherwise if there is no privity between the seller or the auctioneer and the puffer (b).

Treated as fraudulent by the buyer.—The buyer, therefore, has alternative remedies. He may claim to have the contract rescinded, or may maintain an action of deceit for damages. S. 61 (2) saves the rules of law relating to the effect of fraud upon a contract of sale.

Right to bid is expressly reserved.—This clause has the effect of extending to contracts of sale of goods by auction the provisions of s. 6 of 30 & 31 Vict. c. 48, which is confined to sales of land.

S. 58 (4).

But not otherwise.—Therefore the mere fact of a *reserve price*

(y) *Mortimer v. Bell* (1865), 1 Ch. Ap. at p. 13, per Lord Cranworth; *Parfitt v. Jepson* (1877), 46 L. J. C. P. 529, per Lindley, J.; *Thornett v. Haines* (1846), 15 M. & W. 367; 15 L. J. Ex. 230; *Green v. Baverstock* (1863), 14 C. B. N. S. 204.

(z) It was apparently doubted in equity whether, when the sale was

not expressed to be "without reserve," a puffer might not be employed to protect the property: *Dart, V. & P.* (6th ed.) pp. 126, 224, 226.

(a) S. 3 of 30 & 31 Vict. c. 48.

(b) *Union Bank v. Munster* (1887), 37 Ch. D. 61.

S. 58 (4).

The sale being subject to a reserved price does not justify the employment of a puffer.

will not justify the employment of a puffer. See sub-s. 3, which contains no exception of the case where a reserve price is notified; and this sub-section distinguishes between a reserve price and the reservation of a right to bid. The law was the same under the 30 & 31 Vict. c. 48. In *Gilliat v. Gilliat* (c), Lord Romilly, M.R., after showing that the law in s. 5 of that Act made a distinction between a reserved bidding and a reserved right to bid, says:—"You must state whether there is a reserved price or not, and further, if you state there is a reserved price, you must also state that a right to bid is reserved in order that you may employ a person to bid on your behalf."

The bill, as originally drafted, contained after "subject to" in sub-s. 3 the additional words, now omitted, "a reserved price, or." Both sub-sections as they now stand are in accordance with the previous law.

The seller or any one person.—The seller may employ one puffer only. When the right to bid has been reserved under this sub-section it must be rigidly adhered to. Thus, when it was a condition "that the vendor shall have the right, by himself or his agent, of bidding *once* for the property," and the vendor bid three times, the sale was held voidable at the buyer's option (d). And the "right to bid," which is to be "expressly" reserved, would, under this sub-section, be no doubt similarly interpreted as meaning that the particular right expressly declared must be strictly followed.

This clause of sub-s. 4 adopts the supposed rule of equity, which, however, was doubtful as late as 1865 (e).

Acts of buyer stifling competition.

If the buyer, at a sale by auction, persuade or prevent other intending buyers from bidding against him for the goods, or otherwise collude with them, with the object of stifling competition, the sale is fraudulent as against the seller (f). But a mere agreement not to bid in competition is not necessarily a fraud (g). It seems that an agreement for a "knock-out" is an indictable conspiracy (h).

Warranty by auctioneer.

In a sale by auction, which is expressed to be without reserve, the auctioneer is deemed to warrant to the highest *bond fide*

(c) (1869), 9 Eq. 60.

(d) *Parfitt v. Jepson* (1877), 46 L. J. C. P. 529.

(e) *Mortimer v. Bell* (1865), 1 Ch. Ap. 10.

(f) *Fuller v. Abrahams* (1821), 3 B. & B. 116; 6 Moore, 316, latter the better report; Story on Sales,

s. 484.

(g) *Heffer v. Martyn* (1867), 36 L. J. Ch. 372. See, in America, *People v. Stephens*, 71 N. Y. 527; *Myers v. Dorman*, 34 Hun, 117.

(h) *Levi v. Levi* (1833), 6 C. & P. 239, per Gurney, B.

bidder that the sale shall be without reserve(*i*). But the mere advertisement of a sale does not amount to a warranty that the goods shall be sold (*k*), although sub-s. 2 omits to provide therefor.

S. 58 (4).

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

Payment into Court in Scotland when breach of warranty alleged.

This section makes no alteration in the law.

S. 59.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Repeal.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

From the commencement of this Act.—*i.e.*, from the 1st of January, 1894 (s. 63), whereas the bill received the royal assent on the 20th of February, 1894 (*ante*, p. 1); the repeal, therefore, is retrospective, and takes effect from the former date. The schedule, which will be found on p. 316, *post*, does not include the corresponding section of the Irish Statute of Frauds (7 Will. 3, c. 12, s. 13).

S. 60.

Provided that such repeal, &c.—See s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), as to the effect of a repealing clause in a statute.

(*i*) *Warlow v. Harrison* (1858), 1 E. & E. 295.

(*k*) *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286.

S. 61.
Savings.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

S. 61 (1). Cf. s. 97 (1) of the Bills of Exchange, 1882, for a similar saving clause.

The following sections of the Bankruptcy Act, 1883, may be specially noticed:—S. 49, which protects *bond fide* transactions without notice; s. 55, which provides for the disclaimer by the trustee of onerous property; sub-s. (5) of the same section for the rescission by order of the Court in bankruptcy, of contracts made with the bankrupt; ss. 56 and 57, which confer powers on the trustee to deal with the bankrupt's property (including, by s. 168 (1), "goods"); and s. 114, which provides for actions on contracts on which the bankrupt is a joint contractor.

S. 61 (2). (2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

The law merchant.—"There is no part of the English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered by its own courts in the staple, or else in the star chamber. . . . But as the Courts of the staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law either fell into disuse, or were adopted into the common law as the custom of merchants, and after a time began to appear in the books of common law" (1).

The unpaid seller's rights of lien and stoppage *in transitu* were seemingly imported into the common law from the law merchant. (See *ante*, p. 215.)

Save in so far as they are inconsistent, &c.—The provisions of the Act seem in only one or two instances to conflict openly

(1) Blackb. p. 317.

with the pre-existing rules of the common law; *e.g.*, s. 24 (2) abrogates the rule laid down in *Vilmont v. Bentley* (*ante*, p. 128); and s. 48 (2) possibly has the effect of depriving the buyer of the remedy in trover which he previously had at common law. (See notes to that sub-section, *ante*, p. 266.) Other possible inconsistencies have been noticed under the several sections, but the whole extent of the Act in changing the law cannot be finally determined until the Act receives judicial interpretation.

S. 61 (2).

Effect of fraud.—"Fraud renders all contracts voidable *ab initio*, both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent" (*m*). On this point there is nothing peculiar to contracts of sale.

The elements of fraud are thus stated by Lord Herschell in *Derry v. Peek* (*n*):—

The elements of fraud.

"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. . . . If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." And, with regard to honesty of belief, the learned Lord goes on to say (*o*): "At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality."

For the effect of fraud upon title, see ss. 23 and 24 (2), *ante*, pp. 154, 158.

Misrepresentation.—Previously to the Judicature Acts, the law applicable to cases of innocent misrepresentation differed at law and in equity. At law, "where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in

Effect of innocent misrepresentation on buyer's right of rescission.

(*m*) Benj. p. 402.

(*o*) At p. 375.

(*n*) (1889), 14 Ap. Ca. at p. 374.

S. 61 (2).

substance between what was supposed to be, and what was taken, so as to constitute a failure of consideration [under s. 54]. . . . The difficulty in every case is to determine whether the mistake or misapprehension is *as to the substance of the whole consideration*, going, as it were, to the root of the matter, or only to some point, *even though a material point*, an error as to which does not affect the substance of the whole consideration" (p).

Different rule at law and in equity previous to Judicature Acts.

Accordingly, at law, even a *material* misrepresentation was not sufficient to justify a repudiation of the contract. In equity a contract might be rescinded by reason of an innocent misrepresentation of a material fact. "An action of deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. . . . When rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made . . . the contract, having been obtained by misrepresentation, cannot stand" (q).

It should be remarked that, in the above judgment, and also in other cases (r), no distinction is drawn between some kinds of contracts as compared with others, but the rule is stated generally. And Sir William Anson states the law broadly, that the relief given is of general application, and not peculiar to contracts *uberrimæ fidei* (s). The law on this question appears to be in a transition state, and it is impossible to say with any degree of certainty how far the equitable doctrine of material misrepresentation will in future be carried. We have seen (*ante*, p. 71) that, according to the law laid down in *Behn v. Burness* (t), an innocent representation has no effect (except in certain classes of contracts, of which sale was, at that time, at any rate, not one), unless it be a term of the contract, and then it may or may not be a condition, or its falsity may constitute a total failure of consideration, as stated in *Kennedy v. Panama Mail Co.*, *supra*. Will the equitable rule be applicable in future to contracts of sale, and the buyer, for example, be entitled to repudiate the bargain by reason of an innocent misrepresentation of fact, although it may not form a term of the contract? Suppose that in *Bannerman v. White* (u), the facts of which are stated, *ante*, p. 76, the representation by the seller (which

(p) Per Blackburn, J., in *Kennedy v. Panama Mail Co.* (1867), L. R. 2 Q. B. at p. 587.

(q) Per Lord Herschell, in *Derry v. Peek* (1889), 14 Ap. Ca. at p. 359.

(r) e.g., *Redgrave v. Hurd* (1881),

20 Ch. D. 1.

(s) Contr. (5th ed.) p. 153. Prof. Pollock does not state the rule so

widely; on Contr. (5th ed.), p. 509. (t) (1863), 3 B. & S. 751.

(u) (1861), 10 C. B. N. S. 844.

was an innocent one) that no sulphur had been used in the preparation of the hops, had been made verbally, and the actual contract of sale had been committed to writing, omitting the representation? If the equitable rule is to prevail it would seem that the decision in such a case as *Hopkins v. Tanqueray* (x) (*ante*, p. 108) would be different in future. Again, it would no longer be necessary for the jury to find, as they did in *Bannerman v. White* (y), that the representation was *part* of the contract. As a matter of fact, it was made in that case *before* the negotiation, but as Sir William Anson points out (z), the Court had to deal with it as part of the contract, or not at all.

S. 61 (2).

Duress or coercion.—For the common law doctrine of duress, see Pollock on Contracts (5th ed.), p. 576; and the judgment of Butt, J., in *Scott v. Sebright* (a).

Mistake.—With respect to this, see Benj. pp. 59 *et seq.*, 386.

Other invalidating cause—*e.g.*, illegality or impossibility. **Illegality.**
“The contract of sale, like all other contracts, is void when entered into for an illegal consideration, or for purposes violative of good morals, or prohibited by the law-giver. The thing sold may be such as in its nature cannot form the subject of a valid contract of sale, as an obscene book, or an indecent picture, which are deemed by the common law to be evil and noxious things. The article sold may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly used for the purpose prohibited by law, of adulterating food or drink. Or the sale may be prohibited by statute for revenue purposes, or other motive of public policy. In all these cases the law permits neither party to maintain an action on such a sale” (b).

The effect of impossibility, caused by the act or default of the party, on conditions and warranties, is dealt with under s. 11 (3). **Impossibility.**

Impossibility may be (1) in the nature of the thing itself; (2) by law; and (3) in fact; and it may also be antecedent or subsequent to the contract. Impossibility from the nature of things—*i.e.*, physical—renders the agreement void; and impossibility by law (antecedent or subsequent) makes it void, or excuses performance, as the case may be. Impossibility, in fact, furnishes no excuse, except where a recognized exception to the rule is allowed, as, for example, when the contemporaneous existence of a specific thing is contemplated. This case, how-

(x) (1864), 15 C. B. 130.

149, 152, 153.

(y) (1861), 10 C. B. N. S. 844.

(a) (1886), 12 P. D. at pp. 23, 24.

(z) On Contr. (5th ed.), pp. 147—

(b) Benj. p. 490.

S. 61 (2). ever, would appear to be rather an instance of mutual mistake excluding consent. An instance is furnished by s. 6. So, also, where the *continued* existence of a specific thing is contemplated, as in s. 7, performance is excused either on the ground of subsequent impossibility of fact, or rather, perhaps, because the state of things supervening was impliedly excluded from the contract.

See, on this subject, more at large, Benjamin, pp. 550—555, and Pollock on Contracts (5th ed.), pp. 378 *et seq.*

S. 61 (3). (3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

Enactments relating to bills of sale.—The statutes now in force are the 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878), and the 45 & 46 Vict. c. 43 (Bills of Sale Act (1878) Amendment Act, 1882).

Any enactment relating to the sale of goods.—The following list includes some of the principal enactments:—Statutes relating to the sale of goods to infants (*c*); of horses (*d*); of chain cables and anchors (*e*); of food and drugs (*f*); of intoxicating liquors (*g*); of spirits (*h*); of explosives (*i*); of poisons (*k*); of goods to which a trade-mark or description has been applied (*l*); of goods sold by weight or measure (*m*); and of goods sold on Sunday (*n*).

S. 61 (4). (4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the

(*c*) The Infants' Relief Act, 37 & 38 Vict. c. 62, s. 1; see the notes to s. 2, *ante*, pp. 10, 14.

(*d*) 2 & 3 Phil. & Mary, c. 7; 31 Eliz. c. 12, Appendix of Statutes, *post*, p. 317; see s. 22 (2), *ante*, p. 153, and Benj. p. 13.

(*e*) 34 & 35 Vict. c. 101, s. 7; 37 & 38 Vict. c. 51.

(*f*) 38 & 39 Vict. c. 63, amended by 42 & 43 Vict. c. 30.

(*g*) The Licensing Acts, 1872—1874, 35 & 36 Vict. c. 94; 37 & 38 Vict. c. 49.

(*h*) The Tipling Act, 24 Geo. 2,

c. 40, s. 12, amended by 25 & 26 Vict. c. 38.

(*i*) Explosives Act, 1875, 38 Vict. c. 17.

(*k*) The Pharmacy Act, 1868, 31 & 32 Vict. c. 121, s. 17, amended by 32 & 33 Vict. c. 117, s. 3.

(*l*) The Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28.

(*m*) The Weights and Measures Act, 41 & 42 Vict. c. 49, a consolidating statute.

(*n*) 29 Car. 2, c. 7, a somewhat obsolete enactment; see Benj. pp. 535 *et seq.*

form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security. S. 61 (4).

This sub-section, taken in connection with the definitions of "property" in s. 62 (1), has the effect of excluding transactions intended to be pledges, mortgages, &c., from the operation of the Act, according to the maxim of the civil law, *contrahentium voluntas potius quam verba spectari placuit*.

Do not apply—i.e., the transactions mentioned shall not be dealt with as *contracts of sale*.

Intended to operate.—These are the governing words of the sub-section. The transaction, though in the form of a contract of sale, must be, according to the true intention, a mortgage, &c. The rule laid down is, however, not exhaustive, being made applicable only to the transactions specifically mentioned; and it has been applied by the Privy Council to a transaction in the form of a contract of sale, but in reality a financial operation (o). Such cases as the one last mentioned and similar cases, if not mortgages or pledges, would not come under this sub-section, but be interpreted, under s. 1 (1), in their true character. Conversely, under the latter section, would be treated as *contracts of sale* such a transaction as that in *Hutton v. Lippert* (p), where the bargain purported to be a guaranty or an agency, contrary to the real intention.

In this connection *McBain v. Wallace* (q) presents some difficulties. There the transaction was decided to be a sale under s. 1 of the 19 & 20 Vict. c. 60 (repealed by this Act), although there was also an ulterior object that there should be a security for a loan. The Court treated the existence of this object, or "motive," or "intention," as it was variously called, as not undoing the effect of the sale, which was really intended, though the sale might be only a way of working out the object contemplated. Henceforward, it would probably be necessary, if such a case arises again, to decide definitely what was the *main* intention of the parties in entering into the transaction, that is to say, whether sale or security; and, according as this question is answered, the transaction will no doubt fall within the Act or without it under the present sub-section.

(5.) Nothing in this Act shall prejudice or affect S. 61 (5).

(o) *Senecal v. Pauzé* (1889), 14 Ap. Ca. 637.

(p) (1883), 8 Ap. Ca. 309.

(q) (1881), 6 Ap. Ca. 588.

S. 61 (5). the landlord's right of hypothec or sequestration for rent in Scotland.

Re-enacts s. 4 of the 19 & 20 Vict. c. 60, repealed by this Act. See Schedule of repealed enactments, *post*, p. 316.

Interpretation
of terms.

62.—(1.) In this Act, unless the context or subject-matter otherwise requires—

“Action” includes counter-claim and set-off, and in Scotland condescendence and claim and compensation.

S. 62 (1). **Action.**—See ss. 4 (1), 49, 50, 51, 52, 53 (1) (b), 53 (4), 57.

“Bailee” in Scotland includes custodier.

“Buyer” means a person who buys or agrees to buy goods.

See ss. 1 (1) (3), *ante*, p. 6.

“Contract of sale” includes an agreement to sell as well as a sale.

Some instances of the use of the terms as meaning only “agreement to sell” are found in ss. 5 (2) and (3), 16, 18, Rules (2), (3), and 5 (1).

“Defendant” includes in Scotland defender, respondent, and claimant in a multiplepoinding.

“Delivery” means voluntary transfer of possession from one person to another.

Different
senses in
which the
term “de-
livery” is
used,

Mr. Benjamin draws attention to the confusion which has arisen from the different senses in which the term “delivery” has been used (*r*). After referring to its occasional use to denote transfer of *title*, he proceeds, “Even where ‘delivery’ is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract [under s. 4]; the other to the

performance of the contract [under s. 27]. When questions arise as to the 'actual receipt' which is necessary to give validity to a parol contract for the sale of chattels exceeding 10*l.* in value, the judges constantly use the word 'delivery' as the correlative of that 'actual receipt.' [See notes to s. 4, *ante*, pp. 36, 39.] After the sale has been proven to exist, by delivery and actual receipt, there may arise a second and distinct controversy upon the point whether the seller has *performed* his completed bargain by delivery of possession of the bulk to the buyer" (s).

S. 62 (1).

Again, the term "possession," of which the Act does not attempt a definition (t), is open to a variety of meanings. It may be *actual*, when it is used to denote physical control, or *constructive*, when it seems to be correctly applied to a "right to possess" as distinct from possession (u). For certain purposes the right to possess is treated as equivalent to possession; *e.g.*, when goods are sold on credit, the buyer is described as being in constructive possession of them, although the seller retains the actual custody, and, if the buyer become insolvent, is entitled to *retain* possession under s. 41; or, again, when goods have been delivered to a carrier for transmission to the buyer, they are said to be in the buyer's constructive possession. But the term constructive possession is sometimes less correctly applied to cases "where the legal possession of the goods is with one person and the custody with his servant, or some other person for the time being in a like position" (x); *e.g.*, when the carrier has himself attorned to the buyer, or has delivered the goods to the buyer's agent to be held at the buyer's disposal. Hence arises the confusion between one kind of constructive possession by delivery to the carrier which is sufficient to divest the seller's lien, and "another kind of" constructive possession, by attornment of, or delivery by, the carrier, which is sufficient to divest the seller's right of stoppage *in transitu* (y).

Professor Pollock says, with reference to the transfer of possession, "Difficulties which often appear to be, and sometimes really are, formidable, arise in dealing with delivery of possession. They will be found to turn more on the estimation of matters of fact than on any uncertainty of legal principle. In

(s) Benj. p. 677.

(t) Cf. the definition given in s. 1 (2) of the Factors Act, Appendix of Statutes, *post*, p. 325.

(u) Pollock and Wright on Pos-

session, pp. 25, 27.

(x) *Ibid.* p. 27.

(y) See per Brett, M.R., in *Kendal v. Marshall* (1883), 11 Q. B. D. at p. 364.

S. 62 (1). all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliverer in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before the act" (z).

Delivery also may be constructive, *i.e.*, when there is a change of possession without any change of the actual custody (a). This may take place either by attornment, under s. 29 (3), *ante*, p. 184, or by "symbolical" delivery, *e.g.*, the transfer of a bill of lading (b), *ante*, p. 174.

For delivery, and the rules relating thereto, see ss. 27—34.

"Document of title to goods" has the same meaning as it has in the Factors Acts.

See ss. 25, 47, and notes thereon. The definition is given in s. 1 (4) of the Factors Act, 1889, Appendix of Statutes, *post*, p. 325.

"Factors Acts" mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

Factors Act, 1889, 52 & 53 Vict. c. 45. (See Appendix of Statutes, *post*, p. 325.)

"Fault" means wrongful act or default.

See notes to s. 7, *ante*, p. 60; to s. 9 (2), *ante*, p. 64; to s. 20, *ante*, p. 145.

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale.

See s. 5 (1) (3), and s. 18 Rule 5 (1). The acquisition may further depend on a contingency under s. 5 (2), *ante*, p. 55.

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The

(s) Pollock and Wright on Possession, p. 46.

(a) *Ibid.* p. 72.

(b) Benj. p. 704; per Bowen, L.J.,

in *Sanders v. Maclean* (1883), 11 Q. B. D. at p. 341. The question of symbolical delivery is treated fully by Prof. Pollock, pp. 61 *et seq.*

term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. S. 62 (1).

The term "goods" is used throughout the Act. In s. 4 it is substituted for the term "goods, wares, and merchandise" used in s. 17 of the Statute of Frauds.

"Goods" includes "wares and merchandise" in s. 1 (3), of the Factors Act, 1889, *post*, p. 325, and comprehends "all corporeal moveable property" (c).

Things in action.—Include shares (d), scrip (e), and negotiable securities; in fact, all other incorporeal personal property (f).

Emblements, industrial growing crops, &c.—See s. 4 and notes thereon, *ante*, p. 23.

"Lien" in Scotland includes right of retention.

See s. 39 (1) (a), and note (m), *ante*, p. 216; and Benj. p. 384.

"Plaintiff" includes pursuer, complainer, claimant in a multiplepinding and defendant or defender counterclaiming.

"Property" means the general property in goods, and not merely a special property.

A contract of sale is defined in s. 1 (1). It involves the transfer of the *ownership* of the thing sold. "It is essential that there should be a transfer of the absolute or general property in the thing sold; for, in law, a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special, property in it; and a transfer of the special property is not a sale of the thing" (g). So when goods are delivered in pledge, a transaction which is further excluded from the operation of the Act by s. 61 (4), *supra*, the general property remains in the pledgor, and a special property is transferred to

(c) Benj. p. 111.

(d) *Humble v. Mitchell* (1839), 11 A. & E. 205; *Duncuft v. Albrecht* (1841), 12 Sim. 189.

(e) *Knight v. Barber* (1846), 16 M. & W. 66.

(f) Benj. p. 111, and per Lindley, L.J., in *Colonial Bank v. Whinney* (1885), 30 Ch. D. at p. 283.

(g) Benj. p. 2, citing *Jenkyns v. Brown* (1849), 14 Q. B. 496; 19 L. J. Q. B. 286.

S. 62 (1). the pledgee (*h*). The term "property" has received the same interpretation under the Bills of Lading Act (*i*).

"Quality of goods" includes their state or condition.

See s. 14, and notes thereon, *ante*, pp. 91, 97.

"Seller" means a person who sells or agrees to sell goods.

See s. 1 (1) (3), and notes, *ante*, p. 6.

"Sale" includes a bargain and sale as well as a sale and delivery.

See notes to s. 49, *ante*, p. 271.

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made.

See s. 6, *ante*, p. 58; s. 7, *ante*, p. 59; s. 17, *ante*, p. 115; s. 18 Rules 1—3, *ante*, pp. 117—125; s. 19, *ante*, p. 136.

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

See s. 11, and notes, *ante*, p. 68, and s. 53, *ante*, p. 286.

S. 62 (2). (2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in

(*h*) *Halliday v. Holgate* (1868), L. R. 3 Ex. 299. Ap. Ca. 74; and the judgment of Bowen, L.J., in the Court of Appeal,

(*i*) *Burdick v. Sewell* (1884), 10 13 Q. B. D. at p. 175.

fact done honestly, whether it be done negligently or not. S. 62 (2).

See ss. 22 (1), 23, 25, (1) (2), 26 (1), 47, where the definition is required. The same definition of "good faith" is given in s. 90 of the Bills of Exchange Act, 1882. It is apparently based on the distinction between honest blundering or carelessness, and a dishonest refraining from inquiry, pointed out by Lord Blackburn in *Jones v. Gordon* (k).

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not. S. 62 (3).

See ss. 39 (1) (b), 41 (1) (c), 44, where the definition is required.

Notour bankrupt.—A term of Scotch law. See Bell's Dictionary, Law of Scotland, p. 79.

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them. S. 62 (4).

See ss. 18 (Rules 2, 3, and 5 (1)) and 29 (5), and cf. s. 4 (2), "fit or ready for delivery."

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four. Commence-
ment.

The royal assent was not given until the 20th of February, 1894, so that the operation of the Act, probably unintentionally, is retrospective. S. 63.

64. This Act may be cited as the Sale of Goods Act, 1893. Short title.

SCHEDULE.

- S. 60. This Schedule is to be read as referring to the Revised Edition of the Statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1, c. 21	An Act against brokers. The whole Act (<i>a</i>).
29 Cha. 2, c. 3	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen (<i>b</i>) and sixteen* (<i>c</i>).
9 Geo. 4, c. 14	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven (<i>d</i>).
19 & 20 Vict. c. 60 ..	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four (<i>e</i>), and five.
19 & 20 Vict. c. 97 ..	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one (<i>f</i>), and two (<i>g</i>).

* Commonly cited as sections sixteen and seventeen.

- (*a*) Already repealed as to Great Britain by 35 & 36 Vict. c. 93, s. 4 (The Pawnbrokers Act, 1872).
 (*b*) Re-enacted in s. 26.
 (*c*) Re-enacted in s. 4 (1).
 (*d*) Lord Tenterden's Act. The section is re-enacted in s. 4 (2).
 (*e*) Re-enacted in s. 61 (5).
 (*f*) Re-enacted in proviso to s. 26 (1).
 (*g*) Re-enacted with modifications in s. 52.

APPENDIX OF STATUTES.

*The four following Statutes are copied from Pickering's Edition of
"The Statutes at Large."*

(1.) AN ACT AGAINST THE BUYING OF STOLEN HORSES (1555) (a).

(2 & 3 PHIL. & MAR. C. 7.)

FORASMUCH as stolen horses, mares and geldings, by thieves and their confederates, be for the most part sold, exchanged, given, or put away in houses, stables, back-sides, and other secret and privy places of markets and fairs, and the toll also privily paid for the same, whereby the true owners thereof, being not able to try the falsehood and covin betwixt the buyer and seller of such horse, mare or gelding, is by the common law of this realm without remedy: (2) BE IT THEREFORE ENACTED, that the owner, governor, ruler, fermor, steward, bailiff or chief keeper of every fair and market overt within this realm and other the Queen's dominions, shall before the feast of Easter next, and so yearly, appoint and limit out a certain and special open place within the town, place, field or circuit, where horses, mares, geldings and colts have been and shall be used to be sold in any fair or market overt; (2) in which said certain and open place, as is aforesaid, there shall be, by the said ruler or keeper of the said fair or market, put in and appointed one sufficient person or more, to take toll, and keep the same place from ten of the clock before noon until sunset of every day of the foresaid fair and market, upon pain to lose and forfeit for every default forty shillings; (3) and that every toll-gatherer, his deputy or deputies, shall, during the time of every the said fairs and markets, take their due and lawful tolls for every such horse, mare, gelding or colt, at the said open place, to be appointed as is aforesaid, and betwixt the hours of ten of the clock in the morning and sunset of the said day, if it be tendered, and not at any other time or place; (4) and shall have presently before him or them, at the taking of the same toll, the parties to the bargain, exchange, gift, contract, or putting away of every such horse, mare, gelding or colt;

In what manner horses shall be sold in fairs or markets.

A place shall be appointed for a horse-fair, and also a toll-taker.

When, where and of whom toll for horses shall be taken.

(a) See s. 22 (2) of the Sale of Goods Act, *ante*, p. 150.

and also the same horse, mare, gelding and colt so sold, exchanged, or put away; (5) and shall then write or cause to be written in a book to be kept for that purpose, the names, surnames, and dwelling-places of all the said parties, and the colour, with one special mark at the least, of every such horse, mare, gelding and colt; (6) in pain to forfeit at and for every default contrary to the tenor thereof, forty shillings.

A note of all horses sold in a fair or market.

3. And the said toll-gatherer or keeper of the said book shall within one day next after every such fair or market bring and deliver his said book to the owner, governor, ruler, steward, bailiff or chief keeper of the said fair or market, who shall then cause a note to be made of the true number of all horses, mares, geldings and colts sold at the said market or fair, and shall there subscribe his name or set his mark thereunto; (2) upon pain to him that shall make default therein, to lose and forfeit for every default forty shillings, and also answer the party grieved by reason of the same his negligence in every behalf.

The using of a stolen horse in a fair, or, &c., before the owner's property shall be taken away.

4. And be it further enacted by the authority aforesaid that the sale, gift, exchange, or putting away after the last day of February now next coming, in any fair or market overt, of any horse, mare, gelding or colt that is or shall be thievishly stolen, or feloniously taken away from any person or persons, shall not alter, take away, nor exchange the property of any person or persons to or from any such horse, mare, gelding or colt, unless the same horse, mare, gelding or colt shall be in the time of the said fair or market wherein the same shall be so sold, given, exchanged or put away, openly ridden, led, walked, driven or kept standing by the space of one hour together at the least, betwixt ten of the clock of the morning and the sun-setting, in the open place of the fair or market wherein horses are commonly used to be sold, and not within any house, yard, back-side or other privy or secret place, and unless all the parties to the bargain, contract, gift or exchange present in the said fair or market shall also come together, and bring the horse, mare, gelding or colt so sold, exchanged, given or put away to the open place appointed for the toll-taker, or for the book-keeper where no toll is due, and there enter or cause to be entered their names and dwelling-places, in manner as is aforesaid, with the colour or colours, and one special mark at the least of every the same horses, mares, geldings or colts in the toll-taker's book, or in the keeper's book for that purpose where no toll is due, as is aforesaid, and also pay him their toll, if they ought to pay any: and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed, to him that shall write the same in the said book.

5. And if any horse, mare, gelding or colt that is or shall be thievishly stolen or taken away, shall after the said last day of February next coming be sold, given, exchanged or put away in any fair or market, and not used in all points according to the tenor and intent of this estatute, that then the owner of every such horse, mare, gelding or colt shall and may by force of this estatute seize or take again the said horse, mare, gelding or colt, or have an action of detinue or replevin for the same; any sale,

gift, exchange or putting away of any such horse, mare, gelding or colt other than according to this estatute in anywise notwithstanding.

6. The one-half of all which forfeitures to be the King's and Queen's majesties, her heirs, and successors, and the other to him or them that will sue for the same, before the justices of peace or in any of the King's and Queen's majesties' ordinary courts of record, by bill, plaint, action of debt, or information in which suits no protection, essoin or wager of law shall be allowed.

7. And be it enacted by the authority aforesaid, That the justices of peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to inquire, hear, and determine all offences against this estatute as they may do any other matter triable before them.

The justices of the peace shall hear and determine the offences aforesaid.

8. Provided always, That in every such fair or market, where any toll is nor shall be due ne leviabie, by reason of the freedom, liberty or privilege of the said fair or market, the keeper or keepers of the book, touching the execution of this present Act, shall take nor exact but one penny upon and for every contract, for his labour in writing the entry concerning the premises, in manner and form as is before declared.

Allowance of the book-keeper where no toll is due.

(2.) AN ACT TO AVOID HORSE STEALING (1589).

(31 ELIZ. C. 12.)

Whereas through most counties of this realm horse-stealing is grown so common, as neither in pastures or closes, nor hardly in stables, the same are to be in safety from stealing which ensueth by the ready buying of the same by horse-courers and others, in some open fairs or markets far distant from the owner, and with such speed as the owner cannot by pursuit possibly help the same; (2) and sundry good ordinances have heretofore been made touching the manner of selling and tolling of horses, mares, geldings and colts in fairs and markets, which have not wrought so good effect for the repressing or avoiding of horse-stealing, as was expected:—

Sellers of horses in fairs or markets must be known to the toll-taker, or some other who will avouch the sale, which shall be entered in the toll-book, &c.

2. Now for a further remedy in that behalf, be it enacted, by the authority of the present parliament, That no person after twenty days next after the end of this session of parliament, shall in any fair or market sell, give, exchange or put away any horse, mare, gelding, colt or filly, unless the toll-taker there, or (where no toll is paid) the book-keeper, bailiff or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell or offer to sell, give or exchange any horse, mare, gelding, colt or filly, and of his true christian name, surname, and place of dwelling or resiancy, and shall enter all the same his knowledge into a book there kept for the sale of horses; (2) or else, that he so selling, or offering to

A sufficient and credible person shall avouch the horse seller.

The price of the horse shall be entred into the toller's book.

A note in writing shall be given to the buyer.

The penalty of the person offending in any of the cases aforesaid.

sell, give, exchange or put away any horse, mare, gelding, colt or filly shall bring unto the toll-taker or other officer aforesaid, of the same fair or market, one sufficient and credible person that can, shall or will testify and declare unto and before such toll-taker, book-keeper or other officer, That he knoweth the party that so selleth, giveth, exchangeth or putteth away such horse, mare, gelding, colt or filly, and his true name, surname, mystery and dwelling-place, and there enter or cause to be entred in the book of the said toll-taker or officer, as well the true christian name, surname, mystery and place of dwelling or resiancy of him that so selleth, giveth, exchangeth or putteth away such horse, mare, gelding, colt or filly, as of him that so shall testify or avouch his knowledge of the same person; (3) and shall also cause to be entred the very true price or value that he shall have for the same horse, mare, gelding, colt or filly so sold; (4) and that no person shall take upon him to avouch, testify or declare, that he knoweth the party that so shall offer to sell, give, exchange or put away any such horse, mare, gelding, colt or filly, unless he do indeed truly know the same party, and shall truly declare to the toll-taker or other officer aforesaid, as well the christian name, surname, mystery and place of dwelling and resiancy of himself, as of him of and for whom he maketh such testimony and avouchment; (5) and that no toll-taker or other person keeping any book of entry of sales of horses in fairs or markets shall take or receive any toll, or make entry of any sale, gift, exchange or putting away of any horse, mare, gelding, colt or filly, unless he knoweth the party that so selleth, giveth, exchangeth or putteth away any such horse, mare, gelding, colt or filly and his true christian name, surname, mystery, and place of his dwelling or resiancy, or the party that shall and will testify and avouch his knowledge of the same person so selling, giving, exchanging or putting away such horse, mare, gelding, colt or filly, and his true christian name, surname, mystery, and place of dwelling or resiancy, and shall make a perfect entry into the said book of such his knowledge of the person, and of the name, surname, mystery, and place of dwelling or resiancy of the said person, and also the true price or value that shall be *bond fide* taken or had for any such horse, mare, gelding, colt or filly so sold, given, exchanged or put away, so far as he can understand the same, (6) and then give to the party so buying or taken by gift, exchange or otherwise, such horse, mare, gelding, colt or filly, requiring and paying twopence for the same, a true and perfect note in writing of all the full contents of the same subscribed with his hand; (7) on pain that every person that so shall sell, give, exchange or put away any horse, mare, gelding, colt or filly, without being known to the toll-taker or other officer aforesaid, or without bringing such a voucher or witness causing the same to be entred as aforesaid, and every person making any untrue testimony or avouchment in the behalf as aforesaid, and every toll-taker, book-keeper or other officer of fair or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such default the sum of five pounds, (8) but also that every sale,

gift, exchange or other putting away of any horse, mare, gelding, colt or filly, in fair or market, not used in all points according to the true meaning aforesaid, shall be void, the one half of all which forfeitures to be to the Queen's majesty, her heirs, and successors, and the other half to him or them that will sue for the same before the justices of peace, or in any of her majesty's ordinary courts of record, by bill, plaint, action of debt or information; in which no essoin or protection shall be allowed.

Every sale otherwise made shall be void.

3. And be it further enacted that the justices of peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to inquire, hear, and determine all offences against this statute as they may do any other matter triable before them.

The justices of peace may hear and determine the offences aforesaid.

4. And be it further enacted that if any horse, mare, gelding, colt or filly, after twenty days next ensuing the end of this session of Parliament, shall be stolen, and after shall be sold in open fair or market, and the same sale shall be used in all points and circumstances as aforesaid, that yet nevertheless the sale of any such horse, mare, gelding, colt or filly, within six months next after the felony done, shall not take away the property of the owner, from whom the same was stolen, so as claim be made within six months by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, mare, gelding, colt or filly shall be found before the mayor or other head officer of the same town or parish, if the same horse, mare, gelding, colt or filly shall happen to be found in any town corporate or market-town, or else before any justice of peace of that county near to the place where such horse, mare, gelding, colt or filly shall be found if it be out of a town corporate or market-town; (2) and so as proof be made within forty days then next ensuing by two sufficient witnesses, to be produced and deposed before such head officer or justice (who by virtue of this Act shall have authority to minister an oath in that behalf), that the property of the same horse, mare, gelding, colt or filly so claimed was in the party by or from whom such claim is made, and was stolen from him within six months next before such claim of any such horse, gelding, mare, colt or filly; (3) but that the party from whom the said horse, mare, gelding, colt or filly was stolen, his executors or administrators, shall and may at all times after, notwithstanding any such sale or sales in any fair or open market thereof made, have property and power to have, take again, and enjoy the said horse, mare, gelding, colt or filly, upon payment, or readiness, or offer to pay, to the party that shall have the possession and interest of the same horse, mare, gelding, colt or filly, if he will receive and accept it, so much money as the same party shall depose and swear before such head officer, or justice of peace (who by virtue of this Act, shall have authority to minister and give an oath in that behalf) that he paid for the same *bond fide*, without fraud or collusion; any law, statute or other thing to the contrary thereof in anywise notwithstanding.

The owner may redeem a horse stolen from him within six months after, paying the price.

(3.) THE BILLS OF LADING ACT, 1855.

(18 & 19 VICT. c. 111.)

An Act to Amend the Law Relating to Bills of Lading.

Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading, in the hands of a *bond fide* holder for value, should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted as follows:—

Rights under bills of lading to vest in consignee or endorsee.

(1.) Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Not to affect right of stoppage in transitu or claims for freight.

(2.) Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Bill of lading in hands of consignee, &c. conclusive evidence of shipment as against the master, &c. Proviso.

(3.) Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

(4.) THE LARCENY ACT, 1861 (a).

(24 & 25 VICT. c. 96.)

As to restitution and recovery of stolen property.

100. If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided that if it shall appear before any award or order made that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security; provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent entrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act.

Proviso.
Revesting of property on conviction of offender.

(5.) SALE OF LAND BY AUCTION ACT, 1867.

(30 & 31 VICT. c. 48.)

An Act for amending the Law of Auctions of Estates.

[15th July, 1867.]

Be it enacted, &c.

1. This Act may be cited for all purposes as the "Sale of Land by Auction Act, 1867." Short title.

2. This Act shall commence and take effect on the first day of August, 1867. Commence-
ment of Act.

3. "Auctioneer" shall mean any person selling by public auction any land, whether in lots or otherwise: Interpreta-
tion of terms.

(a) See s. 24 (2) of The Sale of Goods Act, *ante*, p. 158.

"Land" shall mean any interest in any messuages, lands, tenements, or hereditaments of whatever tenure :

"Agent" shall mean the solicitor, steward, or land agent of the seller :

"Puffer" shall mean a person appointed to bid on the part of the owner.

Where sales
are invalid
in law to be
also invalid
in equity.

4. And whereas there is at present a conflict between her Majesty's Courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the Courts of law holding that all such sales are absolutely illegal, and the Courts of equity under some circumstances giving effect to them, but even in Courts of equity the rule is unsettled : And whereas it is expedient that an end should be put to such conflicting and unsettled opinions : Be it therefore enacted, that from and after the passing of this Act whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.

Rule respect-
ing sale
without
reserve, &c.

5. And whereas as sales of land by auction are now conducted many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties : Be it therefore enacted by the authority aforesaid as follows : That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved ; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

Rule respect-
ing sale sub-
ject to right
of seller to
bid as he
may think
proper.

6. And where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper.

Practice of
opening
biddings, by
order of Chan-
cery, except
on ground of
fraud, to be
discontinued.

7. And whereas it is the long settled practice of Courts of equity in sales by auction of land under their authority to open biddings even more than once, and much inconvenience has arisen from such practice, and it is expedient that the Courts of equity should no longer have the power to open biddings after sales by auction of land under their authority : Be it further enacted by the authority aforesaid, that the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act, be discontinued, and the highest *bond fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserve price (if any), shall be declared and allowed the purchaser, unless the Court or judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or judge before the chief clerk's certificate of the result of

the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or judge shall think fit.

8. Except as aforesaid, nothing in this Act contained shall affect any sale of land made under or by virtue of any order of the High Court of Chancery in England, of the High Court of Chancery in Ireland, or of the Landed Estates Court there, or of the Court of Chancery in the County Palatine of Lancaster, or of any County or other Court having jurisdiction in equity.

Court of Chancery, &c. in other respects excepted from operation of Act.

9. This Act shall not extend to Scotland.

Not to extend to Scotland.

(6.) THE FACTORS ACT, 1889.

(52 & 53 VICT. c. 45.)

An Act to amend and consolidate the Factors Acts.

Be it enacted, &c.

Preliminary.

1. For the purposes of this Act—

- (1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods: Definitions.
- (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:
- (3.) The expression "goods" shall include wares and merchandise:
- (4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:
- (5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:
- (6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of
mercantile
agent with
respect to
disposition
of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or

Effect of
pledges of
documents
of title.

Pledge for
antecedent
debt.

Rights ac-
quired by
exchange of
goods or
documents.

Agreements
through
clerks, &c.

Provisions
as to con-
signors and
consignees.

sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition
by seller
remaining in
possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Disposition
by buyer
obtaining
possession.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Effect of
transfer of
documents on
vendor's lien
or right of
stoppage *in
transitu*.

Supplemental.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Mode of
transferring
documents.

12.—(1.) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

Saving for
rights of
true owner.

(2.) Nothing in this Act shall prevent the owner of goods

from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

Saving for
common law
powers of
agent.

Repeal.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Commence-
ment.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Extent of
Act.

16. This Act shall not extend to Scotland.

Short title.

17. This Act may be cited as the Factors Act, 1889.

SCHEDULE.

Sect. 14.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4, c. 83....	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. 4, c. 94....	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39..	An Act to amend the law relating to advances <i>bonâ fide</i> made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

(7.) THE STAMP ACT, 1891.

(54 & 55 VICT. c. 39.)

An Act to consolidate the enactments granting and relating to the Stamp Duties upon Instruments, and certain other enactments relating to Stamp Duties. [21st July, 1891.]

Be it enacted as follows:—

Agreements.

22. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed. Duty may be denoted by adhesive stamp.

Bills of Lading.

40.—(1.) A bill of lading is not to be stamped after the execution thereof. Bills of lading.

(2.) Every person who makes or executes any bill of lading not duly stamped shall incur a fine of fifty pounds.

Delivery Orders.

69.—(1.) For the purposes of this Act the expression “delivery order” means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of forty shillings or upwards lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein. Provisions as to duty on delivery order.

(2.) A delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of forty shillings or upwards, unless the contrary is expressly stated therein.

(3.) The duty upon a delivery order may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

70.—(1.) If any person—

(a) Untruly states, or knowingly allows to be untruly stated, in a delivery order, either that the transaction to which it relates is not a sale or transfer of property, or that the goods, wares, or merchandise to which it relates are not of the value of forty shillings; or

(b) Makes, signs, or issues any delivery order chargeable with duty, but not being duly stamped; or

(c) Knowingly, either himself, or by his servant or any other person, delivers, or procures, or authorises the delivery of, any goods, wares, or merchandise mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any false statement with reference either to the nature of the transaction,

Penalty for use of unstamped or untrue order.

or the value of the goods, wares, or merchandise, he shall incur a fine of twenty pounds.

(2.) But a delivery order is not, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

By whom
duty on de-
livery order
to be paid.

71. The duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him.

Receipts.

Provisions as
to duty upon
receipts.

101.—(1.) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2.) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon
which receipts
may be
stamped after
execution.

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say—

- (1.) Within fourteen days after it has been given, on payment of the duty, and a penalty of five pounds.
- (2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds; and shall not in any other case be stamped with an impressed stamp.

Penalty for
offences in
reference to
receipts.

103. If any person—

- (1.) Gives a receipt liable to duty and not duly stamped; or
- (2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or
- (3.) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

Warrants for Goods.

Provisions as
to warrants
for goods.

111.—(1.) For the purposes of this Act, the expression "warrant for goods" means any document or writing, being evidence of the title of any person therein named, or his assigns,

or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.

(2.) The duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

(3.) Every person who makes, executes, or issues or receives or takes by way of security or indemnity any warrant for goods not being duly stamped, shall incur a fine of twenty pounds.

FIRST SCHEDULE.

	£	s.	d.
AGREEMENT or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument	0	0	6

Exemptions.

- (1.) Agreement or memorandum the matter whereof is not of the value of 5*l*.
- (2.) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.
- (3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.
- (4.) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.
- (5.) Agreement entered into between a landlord and tenant pursuant to sub-section six of section eight or sub-section two of section twenty of the Land Law (Ireland) Act, 1881.

BILL of LADING of or for any goods, merchandise, or effects to be exported or carried coastwise	0	0	6
---------------------------------------------------------------------------------------------------------	---	---	---

DELIVERY ORDER	0	0	1
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RECEIPT given for, or upon the payment of, money amounting to 2 <i>l</i> . or upwards	0	0	1
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Exemptions.

- (8.) Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.
- (9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.
- (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

WARRANT FOR GOODS..	£	s.	d.
							0	0	3

Exemptions.

- (1.) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.
- (2.) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.

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